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AMERICAN BAR ASSOCIATION

JOVRNAL

JUNE, 1931

American Law Institute Holds Ninth Annual Meeting

Organizing the Power of the American Bar
By JOHN H. WIGMORE

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XVII JUNE, 1931 NO. 6

Meeting of the Executive Committee at Washington

THE Executive Committee of the American Bar Association determined to recommend to the incoming Committee at its meeting in Atlantic City in September, 1931, that the annual meeting of 1932 be held in the early fall in the City of Washington. During that year the bi-centennial of the birth of George Washington will be celebrated under the direction of the Commission authorized by Congress.

It is contemplated that on Saturday, October 1st, 1932, some appropriate ceremony will be arranged subject to the approval of the Supreme Court Building Commission to commemorate the construction of the new building for the Supreme Court of the United States. It is expected that the presence during the same week of the Conference of the Chief Justice of the United States and the senior circuit judges of the United States will add especial interest to the commemoration ceremony, and that many members of the American Bar Association will avail themselves of the opportunity to attend the opening of the annual term of the Supreme Court on Monday, October 3, 1932.

At the same meeting, which was held in Washington, D. C. on May 4 and 5, with another session on Saturday of the same week, President Boston was authorized to notify the French Line that the name of the American Bar Association was being used without authority in connection with a proposed summer European trip on a vessel of that company, for which the patronage of American Lawyers was being solicited.

A report of the sub-committee on incorporation of the Association was received and approved. The report recommended that the title to the property of the Association should be held, as at present, in trust, and that there should be no incorporation of a holding company. It further stated that its investigation showed that it was possible in Illinois to incorporate the Association as a corporation not for profit, with right to hold meetings outside of the state, and that it also had the right, as such corporation, to organize itself on the Federal principle and with a legislative body, limited in numbers, as the Medical Association had done. However, it recommended that until the final report of the Committee on Coordination of the Bar was presented and the future structure of the Association was determined, the project of incorporation should be postponed.

The report of the Committee on Coordination of the Bar, making certain tentative suggestions in regard to the election of members of the General Council by the members of the American Bar Association of their respective states, enlarging the functions of the General Council, and providing for more frequent meetings, was approved and ordered sent to the members of the Council for consideration with a view of securing their reactions to the proposals.

The report of the Council on Legal Education and Admissions to the Bar on the resolution of the Association adopted at Memphis, in favor of a separate and required course in Professional Ethics in all law schools, and also in favor of making an examination in that subject a requirement for admission to the Bar, was received. It stated that the Council had taken up the question with the Association of American Law Schools, which had adopted a resolution expressing a desire to cooperate with the American Bar Association in improving the standards of professional conduct. The Council believed the matter could be worked out in a spirit of cooperation. It therefore asked the Executive Committee's "approval of its course in

carrying on negotiations with the law schools looking toward the giving of a compulsory separate course in that subject and in securing their cooperation in this regard with the American Bar Association." The report added that the Committee on Professional Ethics was in full accord with this proposal. The Executive Committee approved the course adopted.

The Council further stated that it plans to pursue the subject with each state Board of Bar Examiners and to endeavor to secure the adoption by each state Board of a rule that professional ethics shall be included in each Bar Examination.

Certain proposals for the amendment of the Constitution relating to the cessation of property interest on termination of membership and relating to resignation of members, were considered and, after certain changes in the latter, were ordered published as required by the Constitution for such amendments. A proposed amendment to the By-Laws dealing with the authority of the Committee on Professional Ethics and Grievances to express its opinion concerning proper judicial conduct, other than in matters of judicial decision or discretion, was also ordered published.

Reports of various other committees were received and the regular routine business was transacted.

French Bar Expresses Appreciation of American Hospitality

ON May 6, at a luncheon at the Cosmos Club at Washington given under the auspices of the District of Columbia Bar Association, Ambassador Claudel of France presented a gift from the "Association Nationale Des Avocats Inscrits" to the American Bar Association. It was an exquisite group of Sèvres, a product of the national factory of France, and it was given by the organization of French lawyers as a token of appreciation of the hospitality extended their representatives during their visit to this country in 1930. The luncheon was a notable affair and nearly three hundred guests attended.

Secretary Stimson's Address

Secretary of State, Henry L. Stimson presided. He was introduced by President George P. Hoover of the District Bar Association, and in turn he presented Ambassador Claudel to the gathering. Mr. Stimson spoke as follows:

"Your Excellency, Mr. President of the American Bar Association, Mr. Ex-President of the American Bar Association, ladies and gentlemen:

"This happy occasion has its roots in the distant past. In the summer of 1924, after an invitation from the British, the Canadian, and the French Bars, the entire bar of the United States hurriedly enrolled themselves as members of the American Bar Association, and embarked for Europe. Like Columbus, they embarked on three vessels; but the capacity of the Berengaria and her sister ships was considerably larger than the capacity of the three caravels.

"Unlike Jason and his argonauts, they left the Golden Fleece behind them.

"Reports differ as to the effect upon this country of the absence of many lawyers. I have been credibly informed by economists that the presence of so much unexpected money in the unworthy pockets of clients was responsible for the starting of that era of gross speculation which has landed us in our present state.

"I personally witnessed some of the effect that the exodus had upon the unsuspecting peoples on the other side of the Atlantic. The hordes descended upon the defenseless coast of Britain like the Biblical swarm of locusts. Never was such a record in banquets made, even in that center of banquets, London. It was credibly reported on the afternoon following the Berengaria's arrival in the morning in Southampton, that the price of silk hats rose on the exchange of London fifty per cent. And during the following week, if you met a gentleman in a silk hat walking down the Strand or Piccadilly, the chances were at least seven out of ten that he was a member of the American Bar.

"After a week of royal entertainment there, we separated into three divisions. A sturdy band of patriots, taking their shillalehs in hand, marched on Dublin. Another more modest group, of which your unworthy chairman was a member, sought the ecclesiastical shades of Edinburgh. But the élite of the bar, comprising my friend Mr. Boston and a number of his peers, crossed the Channel, and enjoyed the hospitality of France.

"The historical records show that they visited the Palais de Justice and Sainte Chapelle. What the records do not show as to the places of their visits, I will not pry into. But it was a most delightful occasion. That was evident from the unanimous testimony of all.

"For a number of years we were unsuccessful in persuading our hospitable, our charming hosts to return their visit. Perhaps we left them too poor. Perhaps, like us, they were engaged in the collection of golden harvests during those five years of prosperity. But, at any rate, in 1930 the opportunity came, and the bars of France and Britain and Canada did us the honor to come to this shore.

"I know that we enjoyed it. I hope that they did; and I feel, with all of you, the tingle of warmth that the association with those men of our own profession in these countries brought to our hearts.

"The French bar, acting through the Association Nationale des Avocats Inscrits, have desired to have their appreciation signified to the American Bar Association, and as a medium for that object they could not have chosen a more sympathetic, a more worthy, a more dignified representative than he who is the friend of all of us here, but perhaps from our closer associations the particular and very dear friend of us in the State Department, his Excellency the Ambassador of France."

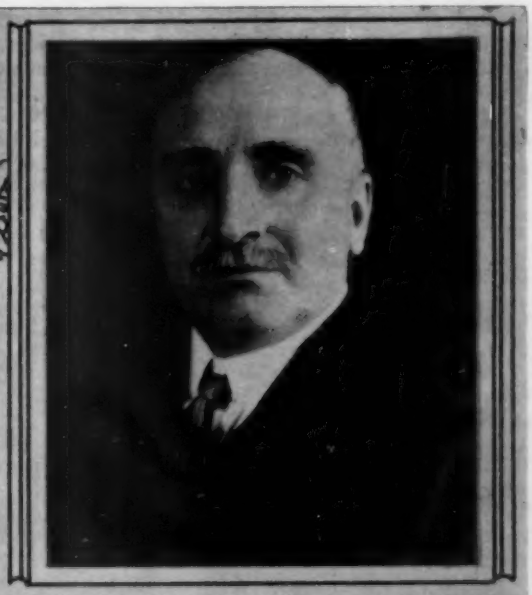
French Ambassador Presents Gift

Ambassador Claudel then presented the gift to the American Bar Association in the following words:

"Gentlemen: To the delight of being today the guest of the American Bar Association is added the one of being in the company of the Honorable Secretary of State and I wish to thank your President, Mr. Charles Boston, for having organized this meeting.

"In 1924, an important delegation of your Association, headed by the present Chief Justice and several prominent personalities, visited France where their colleagues were most happy to receive them. The visit was repaid last summer and your

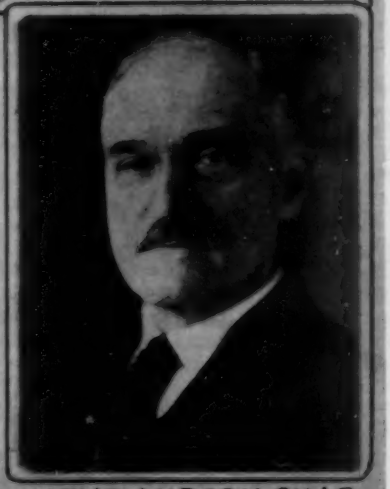
HENRY L. STIMSON



AMBASSADOR PAUL CLAUDEL

CHARLES A. BOSTON

Exquisite Group of Sèvres presented by Association of Avocats Inscrits to the American Bar Association in appreciation of the hospitality extended last summer, and those participating in the official presentation and reception of gift.



HENRY UPSON SIMS

hospitality has left an imperishable memory among the members of the French delegation. This Sèvres group which I have the privilege of presenting to you in their name is a token of their gratitude.

"Such visits have the most useful results. They not only permit free discussions of theoretical and practical problems and of topics of common technical interest, but they improve as well general relations between countries, and bring better international understanding.

"It has been said that the French are a nation of lawyers and I once heard the remark made that in America it is not safe to try to cross a street without securing first the help of a lawyer. Judging from the fact that in both countries the highest offices are very often held by men of your profession, there is something true in those remarks and it is flattering for you.

"I feel sure that the United States were a matter of passionate interest to the French delegation last summer. The spirit of American law is a curious and successful blend of French dogmatism and Anglo-Saxon opportunism. From the ideas of the French eighteenth century it has retained the belief in written declarations of rights, universal principles of government, perfect constitutions and respect of the word of the law, and the American Revolution was partly a reflection of French philosophical ideas. Of Anglo-Saxon opportunism it has kept the method of legislating through established precedent rather than through codified laws. It seems desirable that a closer cooperation among you and your French colleagues should take place, as great results could be expected from it for the benefit of the world peace.

"Allow me to add a few words—to read to you the following message just received from Senator Eccard, President of the French Association of lawyers:

" 'Kindly transmit the following message to the American Bar Association: On the day of the celebration of our common remembrances, the Association of French lawyers expresses its deep gratitude to you for your magnificent hospitality and sends you its best wishes of happiness and prosperity.'

"Allow me to join Senator Eccard in his wishes to the American Bar Association and to extend them to Mr. Stimson, who so kindly consented to attend this ceremony."

President Boston Accepts Gift for Association

President Boston then accepted the gift on behalf of the Association:

"Your Excellency: It is with the keenest appreciation of the honor which you do to the American Bar Association by your presence with us today, that in behalf of the Association and its Executive Committee I accept the beautiful and artistic gift which you bring from the Association Nationale des Avocats Inscrits. While it is presented by the members of this institution, in recognition of our charming experiences together in our country last summer, when some of them were our welcome guests, it awakens in our memories not only that visit, but as well the recollections of the hospitality which we enjoyed in France in 1924, more than six years ago. We can never forget, those of us who were so fortunate as to be there, the generous and delightful reception from your President, the wonderful and gracious entertainment by the City of Paris, the meeting in your Palais de Justice, the visit to the Sainte Chapelle, the luncheon in the Orangerie at Versailles, where we listened to some of your most distinguished statesmen, the evening at the official residence and in the adjoining garden of the Minister of Justice; these and many other courtesies recur to our memories, and are made more vivid by this present reminder.

"We are touched emotionally by the generosity and beauty of this gift, and shall place it among our valued treasures at the house of the Association, in Chicago, to be used upon appropriate occasions, and always to recall to ourselves and those who succeed us this renewal of the sentimental relations which have always existed between your country and mine, from the days when you helped us in the American Revolution until the World War when we were allies, and later on the visits which I have mentioned.

"I know, your Excellency, that you will convey to the donors our heartfelt thanks which I now extend.

"I cannot, however, resist the temptation to recall some history which is brought to my mind by the very name of the Association which makes this gift—Association Nationale des Avocats Inscrits.

"With my meagre knowledge of your language, I should be inclined to translate that 'Enrolled Advocates.' And this opens a widening vista of historical memories, extending through early periods of France, into England, and thence into the American colonies, and these United States. For the idea of an enrolled attorney (as we style them in this latter day) originated, if I am correctly informed, in France as long ago as an Ordinance of 1274, repeated in an Ordinance of Philippe de Valois in or about 1327.

"It is to be recalled that as early as 1337 Edward III of England claimed the French Crown in the right of his mother, a daughter of Philip IV, and shortly after began the hundred years war between England and France, during which occurred the famous battles of Crécy, Poitiers and Agincourt, the Siege of Orleans and the romantic and pitiful life and death of Jeanne d'Arc, the Maid of Orleans. This period has been memorialized to English and Americans by Shakespeare in his historical dramas Richard II, Henry IV, Henry V and Henry VI, until, in 1453, of all the English possessions in France, Calais alone was left.

"I mention this historical picture because it was in virtue of the Act of 4 Henry IV, c. 18, in 1402, that Attorneys are said first to have been enrolled in England. It will be recalled that Henry IV claimed to be King of France; this Act was formulated in law French; it is known as the Model Act, upon which as a foundation subsequent legislation in England regulating the legal profession is based. It is said to have been taken, in turn, from a Royal Ordinance in France of 1344. We have inherited our professional traditions from England. It is, therefore, primarily due to the early history of the profession in France, thus so closely connected with its inception as an enrolled body in England, that the legal practitioners in America today have their best traditions.

"While paying this tribute, Your Excellency, to the origin of our ideals in France of the Fourteenth Century, I take this opportunity to say, to

my American brethren, that in the Ecclesiastical Courts of the Bishops in France, in the Twelfth Century, the advocates were required to study Canon and Civil Law for three years; a period which even now is not required in some American States; that under an Ordinance of Philippe le Hardi, in 1274, French lawyers were required to renew their official oath annually, a precaution which we neglect; they promised to take none but just causes. Usage required counsel to address the Court bonneted as an indication of freedom of speech, and Shakespeare makes Othello say: "My demerits may speak, and bonneted to as proud a fortune as this that I have reached."

"As early as 1302 the nucleus of the Order of Barristers was formed at Paris; a more formal organization was instituted in 1327, consisting of both Barristers and Solicitors; the Barristers formed their own order in the Sixteenth Century; it was dissolved in 1790 during the Revolution; until 1804 litigants might be represented by a citizen.

"In 1804, Bonaparte, First Consul, reestablished a roll of Barristers; the order was resurrected by Decree, in December 1810; but a voluntary body had been formed immediately after the Revolutionary Decree, to preserve the traditions of the order. When, in 1810, they were reestablished, some of their ancient liberties were denied to them. These privileges were, however, gradually restored in 1822, 1830 and 1852.

"I am led to make these hasty statements to my comrades here, that those who are not informed may appreciate, at least in a small degree, the ancient foundations and varied history of the Enrolled Advocates in France, and the fact that through Henry IV, the lawyers of England and America may trace their origin to substantially the same source.

I am not fully informed of the relation of the National Association to the order which was revived by Napoleon the First; though I now know that it was formed in 1921 pursuant to the permission of a law of 1920 for the institution of professional associations, and like the American Bar Association in its catholicity it offers membership to enrolled advocates of all of the Bars of France, of the Colonies and of the countries of the Protectorates; but it is obvious that we have enough in common to trace a fraternity through many centuries of past history, and not to depend entirely upon contacts of 1924 and 1930. I am indebted to my friend, the late Paul Fuller, of the famous firm of Coudert Brothers, for some of the data I have used, and I deeply regret that he did not live to see this day; he was equally at home in France and America.

"Once again, Your Excellency, I thank both you and the donors. I shall ask my predecessor, Henry Upson Sims, Esq., who, as President of the American Bar Association in the summer of 1930, extended our hospitality to our guests, to present an inscribed memorial of our appreciation of the gift."

Ex-President Sims Presents Resolution of Executive Committee

At the conclusion of President Boston's remarks Hon. Henry Upson Sims, who was President of the American Bar Association during the visit of the French lawyers, presented to the Ambassador an engrossed parchment setting forth the resolution of the Executive Committee of the Association expressing appreciation for the gift. Mr. Sims spoke as follows:

"Mr. Secretary, Mr. Ambassador, Mr. President: Probably the most complete satisfaction which can be found in the relation between giver and receiver exists only when there is mutual confidence that the giver delights to give and that the receiver delights to receive.

"It is a satisfaction which obtains most conspicuously when the giver is a parent and the receiver a child. But it may obtain also between those who stand in loco parentis and those who stand in the position of tutelage.

"When the confidence is thus complete, it is never necessary for the child to make a present to the parent; but when the relation of parent and child has been graciously recognized as springing from the heart instead of from the blood, it is quite appropriate that a token be offered by the child in recognition of the relation. As you yourself have well said, Mr. Ambassador, in one of your plays, "A quoi sert le meilleur parfum dans un vase qui est fermé?"

"I had the honor, last Summer, of presenting to the members of our association gathered at Chicago, Maitre Fernand Izouard, the representative of the Association Nationale des Avocats Inscrits de la France to our meeting and one of our guests on that occasion, and he made us very sensitively aware that the National Association of France had been re-established ten years ago in large part as a copy of our association. 'Dans l'image de la votre,' as he most graciously expressed it. Therefore, the French Association will doubtless permit us to regard it as our own child.

"In France the birthday of every person is a day of joy in the family—a day which the relations recognize with gifts to the one who celebrates the anniversary. We have the same custom in America. But we have also the special custom of recognizing the birthday of the mother of the family. And such is the importance of that day in the customs of our people that there has been established, in honor of all the mothers of the nation, a symbolic birthday for all mothers, which we call 'Mothers' Day.' This day comes always on a Sunday; and for this year the 'Mothers' Day' will occur next Sunday, the tenth of May.

"Is the American Bar Association too bold in considering itself the mother of the Association Nationale des Avocats Inscrits de la France? And in regarding the magnificent gift which you have just presented to us on the part of our beloved child as given in recognition of the existence of a relation of parent and child between us?

"The American Bar Association has adopted a resolution to partially express the gratitude which we feel in accepting this beautiful gift; and we have had it transcribed in the form of a memorial on vellum in both French and English. We are going to ask you, Mr. Ambassador, to have the goodness to have it transmitted to the Association Nationale des Avocats Inscrits de la France, and while giving you that trouble, we beg you to accept the assurance of our deep appreciation and of our sincere admiration. I shall not read to you the French text of the memorial; but that those here present may

be informed of it, I shall read the English translation.

"'To the Association Nationale des Avocats Inscrits:

"'The American Bar Association acknowledges gratefully the sentiments of cordiality and affection represented in the beautiful gift so typical of the high art of France presented through the distinguished Ambassador of the French Republic. Since the founding of our Republic the lawyers of America have delved into French learning for the inspiration and idealism which characterize the institutions of these nations. It is but fitting, therefore, that the members of the legal profession of the two nations should fraternize and exchange views in order that we may be the better qualified to point the way for the future development of these institutions toward the protection of life and liberty and the pursuit of happiness for our respective citizens. Our contact with those of the donors who lately visited our shores assures us that this gift is from the heart. This symbol of reciprocated esteem and good feeling will be treasured by the American Bar Association as a constant reminder of the common aspirations which animate the members of our two organizations.

"'Done at the City of Washington in the District of Columbia this sixth day of May, Anno Domini 1931, and of the Independence of the United States of America the one hundred and fifty-fifth year.

"'The American Bar Association
(Sgd) Charles A. Boston,
Its President.'"

(SEAL)
Attest:
(Sgd) Wm. P. MacCracken,
Secretary.

Cleveland Bar Entertains Canadian Delegates

AN international event of special interest to the profession was the recent visit of a delegation of fifty-eight Toronto lawyers to Cleveland, Ohio, to learn how American courts were conducted and to enjoy the hospitality of their American brethren. They came in response to an invitation extended by the Cleveland Bar some months ago and were entertained by that organization while in Cleveland. President Boston of the American Bar Association took official notice of the gathering by sending a telegram of greeting from the Association.

The program was a long one and kept the visitors busy. They arrived in Cleveland in the morning and were escorted to the Statler Hotel where breakfast was served. On this occasion speeches were made by Mayor John D. Marshall, L. Packer Esq., representing the English-speaking Union, and William B. Stewart, in behalf of the Canadian Camp Fire Club. Then there were visits to banking institutions and to the new court house, where they were present at the first drawing of names from the jury wheel by County Clerk Thomas C. Cook and Sheriff John M. Sulzmann. At luncheon in the grand ball room of Hotel Hollenden about three hundred members of the Bar were present. Judge A. G. Newcomb of the Nisi Prius Court presided and speeches were made by Hon. Gilbert Bettman, Attorney General of Ohio, Lieutenant Colonel the Honorable W. H. Price, K. C., Attorney General of Ontario, and Andrew Squire, Esq.

The banquet in the evening was a fitting climax to the day's program. It was attended by about six hundred members of the Bar. During the evening Mr. Justice John Fosbury Orde of the Ontario Appellate Court, on behalf of the visitors, presented robes to Judges Willis Vickery, Manuel Levine and Carl V. Weygandt of the Court of Appeals—to serve as symbols of the majesty of the law and as tokens of international friendship.

James R. Garfield, Esq., son of former President Garfield, welcomed the visitors to Cleveland on behalf of the Cleveland Bar Association. Mr. Garfield said: "There is no division between your country and our country except a political one. There is much between your people and our people that will lead to the betterment of the human race. Upon the Bars of these two countries rests the civilization that comes to us from the mother country and the older nations of Europe."

Replying, Mr. Justice John Fosbury Orde, after paying tribute to Sir William Mulock, eighty-four year old Chief Justice of Canadian courts whose place he took on the program, commended the people of the City of Cleveland whose industry has made possible this remarkably beautiful city and its suburbs. The future happiness of the world, in his opinion, depends upon the cooperation of the British Empire and the United States. He declared that the presentation by the Bar of the City of Toronto to the Bar of the City of Cleveland of the robes for the Judges of the Court of Appeals is symbolic of the friendship of the peoples of the two cities. Mr. Justice Orde traced the history of robes in English courts and explained their significance. As he finished, Assistant United States District Attorney Wm. J. McDermott, Perry A. Frey, President of the Ipsa Loquitur Club, and Lockwood Thompson, Esq., all members of The Cleveland Bar Association, standing behind the chairs of the Judges, assisted them into the robes, which are of black silk.

In a speech of thanks for his associates of the Cuyahoga County Court of Appeals and himself, Judge Willis Vickery, senior member of the Court, said: "I, the oldest member, thank you for the splendid gift from our Canadian brothers. I thank you for this investiture and the presentation of these gowns. I have always been in favor of the wearing of gowns, because it separates the man from the office. Men may come and men may go, but the institution which the gown typifies will remain as long as the English law and the customs of the English speaking civilization endure. England has given us our law, our civil government and the richest literature in the world. We and Canada owe everything that is worth while in our civilization to the little island of England."

President Day of The Cleveland Bar Association then introduced Arthur Slaght, K. C., who spoke on the Apprehension of Criminals and the Presentation and Trial of Criminal Cases under Canadian Law. He said in Canada they had endeavored to overcome the four main difficulties in the administration of criminal justice by abolishing the distinction between felonies and misdemeanors, by permitting trials by judges without juries, by

Judge Emerson Coatsworth (left) and Lieut. Col. George A. Drew (right), two members of the group of Toronto lawyers recently entertained by the Cleveland Bar.

disregarding technicalities in indictments, and by speedy trial and punishment.

The Honorable Emerson Coatsworth, LL.B., K. C., Senior Magistrate of Toronto, speaking on the subject "Treatment and Disposition of Prisoners After Sentence," said: "The problem of crime must be solved by inspired use of the home, the school and the social welfare organizations."

Lieutenant-Colonel George A. Drew, Master of the Supreme Court of Ontario, speaking on the subject "Simplified Pleading and Practice Under the English and Canadian Law," explained in detail the English Master System of disposing of cases before they reach the trial room.

J. C. McReuer, K. C., speaking on the subject "Appeal in Civil Cases," gave a detailed explanation of procedure for appeal in Canadian civil cases.

Arrangements for this interesting and successful exchange of international courtesies were made by a committee of the Cleveland Bar composed of R. B. Newcomb, Chairman; Perry A. Frey, Vice-Chairman; Edward J. Demson, Chairman of the Banquet Committee; Wendell A. Falsgraf, Secretary; members of the Ipsa Loquitur Club and the Court of Nisi Prius.

Committee on Unauthorized Practice of the Law Meets at Washington

THE Committee on Unauthorized Practice of the Law held a meeting at the Mayflower Hotel in Washington, D. C., on May 5th and 6th with John G. Jackson of New York City, Chairman of the Committee, presiding. All members of the committee were present.

In a resolution adopted at the annual meeting of the Association at Chicago the Committee was authorized to make an investigation of the practice of law by corporations and laymen, and of the relations existing between such corporations and laymen and the lawyers associated with or employed by them. At the first meeting of the Committee which was held in Chicago in March. it was decided to send a letter and questionnaire to the Presidents of the various State and Local Bar Associations throughout the United States. In accordance therewith the letter and questionnaire were sent to 1200 associations. Hundreds of replies were received from officers and committees of State and Local bar associations and from many individual members of the bar.

It is indeed evident from the replies that the encroachment of corporations and laymen upon the practice of law is widespread and is rapidly increasing. The larger share of lay encroachments arises in the metropolitan sections of the United States. Complaints are made against banks, trust companies, collection agencies, trade organizations, credit associations, title companies, corporate organizers, automobile associations, mortgage loan companies, adjusters and personal injury solicitation companies, accountants, tax reduction bureaus, property owners associations, real estate brokers, Notaries Public, Justices of the Peace and other laymen.

Steps have been taken in various cities and states to check such unauthorized practices. Quo warranto and injunction proceedings have been instituted and also criminal prosecutions. In addition, recent legislation has been introduced and passed by the Legislatures in many states. It has also been suggested that a uniform statute on this subject should be prepared for submission to the Legislatures in the various states. Collective advertising by bar associations has also been proposed.

This problem has aroused intense interest on the part of members of the bar throughout the entire United States and is considered one of the most important that faces the profession today. There has been an urgent need for this committee. The various state and local bar associations are looking to the American Bar Association to lead the way to a solution of a problem which Calvin Coolidge has said is so serious as almost to menace the future existence of the profession.

At the Washington meeting individuals and representatives of various associations and groups appeared before the Committee and made suggestions with reference to different phases of this problem. A willingness to co-operate in every way possible was also evidenced. The many suggestions that had been made in the replies to the questionnaires likewise received the serious consideration of the Committee.

The Committee also met with the Committee on Professional Ethics and Grievances and further discussed the situation. It outlined its report and the same is now in process of preparation.

The Committee will be glad to receive any further suggestions, comments or views that any members of the bar may have relative to this important problem. Its personnel is as follows: John G. Jackson of New York City, Chairman; Charles A. Beardsley of Oakland, California; Stanley B. Houck of Minneapolis, Minnesota; Edward J. McCullen of St. Louis, Missouri; and John R. Snively of Rockford, Illinois. All replies to the questionnaire, however, should be addressed to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago. It is hoped that all associations will answer. J. R. S.

AMERICAN LAW INSTITUTE HOLDS NINTH ANNUAL MEETING

Large Attendance Manifests Unabated Interest in Work—Considers One Revised and Eight Tentative Drafts Covering Over Thirteen Hundred Pages—Model Statute on Summoning Witness From Another State Adopted—Rule Permitting Comment by Court, Prosecutor and Defense on Failure of Defendant to Testify Recommended—President Wickersham Reviews Eight Years of Life of the Institute—Chief Justice Hughes Speaks

THE ninth annual meeting of the American Law Institute, held at Washington on May 7, 8 and 9, closed with a record of substantial accomplishment. Tentative drafts on Property, Agency, Torts, Contracts, Trusts and Administration of the Criminal Law, and a Proposed Final Draft on Conflict of Laws were considered in full meeting, after having previously run the gauntlet of Reporters and Advisers and the Council of the Institute. The now familiar procedure was followed, the Reporters explaining their attitude on such sections as seemed to require it and making a note of constructive suggestions brought out by the discussion.

In the case of the Tentative Draft on Criminal Law, which covered the subjects of "Summoning Witness in One State to Testify in Another State," "Killing or Wounding to Effect Arrest" and "Comment on Fact Defendant Did Not Testify," definite approval was given to a proposed statute dealing with the first matter and to a proposed rule governing the third. The proposed statute on the subject of killing and wounding to effect arrest, as to which there were marked differences of opinion among Reporters, Advisers and the Council, was referred back for further consideration.

All in all, the Washington meeting furnished a good deal of justification for Chief Justice Hughes' humorous statement that the gatherings of this organization are coming to be the spring meeting of the American Bench and Bar. The attendance was large and every section of the country was well represented by Judges, practitioners and teachers of the law. What is more, these representatives were there for a purpose and went about it in a practical way, having behind them, for the most part, the experience of eight years on this kind of work. The meeting of committees of other legal organizations in Washington at the same time as the Institute swelled the attendance of lawyers at the capital and further contributed to the impression of a national assembly of the Bench and Bar.

President Wickersham Sums Up Eight Years of Institute's Life

The fact that the meeting marked the end of eight years of the Institute's life formed the point of departure for a large part of the address of President Wickersham. "Naturally, it may be asked," he said, "if we have made as much progress during that period as the Bar had reason to expect." And he proceeded to answer the question by giving a rapid summary of the Institute's accomplishment. As his address was transmitted over the radio, such a summary furnished the wider public with a more accurate description of the organization and its work than it was likely to get from any other source.

A feature of particular interest in the address was his declaration that the Institute, with the organization and technique it has developed "would seem qualified, with appropriate support, to undertake such a restudy of the substantive law of crimes as was contemplated by Governor Hadley in the original resolution offered by him at its organization meeting."

"The time for such action," he said, "is peculiarly opportune. The work of the Commission created by President Hoover in 1929 to study and report upon the problem of the enforcement of laws will come to an end with the expiration of the congressional appropriation for its work on June 30th, 1931. During the two years' period of its existence, it has caused studies to be made by many qualified persons into such subjects as Police, Prosecution, Courts, Probation, Prisons and Parole, Criminal Statistics, Criminal Justice and the Foreign Born, Causes of Crime, Cost of Crime and Juvenile Delinquency, Lawlessness of Government Officials, besides the controversial Subject of Prohibition—public interest in which largely has overshadowed any attention to these other topics. Reports on the subjects mentioned will shortly be issued. It is believed that they will contain much useful and accurate information and make recommendations of legislative and administrative action which should be helpful in solving the problem of insuring better law observance.

"Two years is all too short a time," he continued, "in which to make thorough and searching investigation into the effect of law, or lack of law, or into the social problems involved in the present unsatisfactory condition of observance and enforcement of our criminal law. It has taken this Institute five years of continued effort by highly qualified experts to produce a model Code of Criminal Procedure. It will require considerable time to probe the various causes of the public attitude toward the laws of the land and to prepare and submit remedies which will withstand the criticism and attacks of those affected by them. The work of the National Commission should be of great value to those who undertake such further effort. Indeed, some such body as this Institute must undertake the necessary constructive follow-up work, if the labors of the National Commission are to fructify into the most useful results. It is my hope that this Institute may be enabled to undertake a part at least of that task. Of course, no new under-

taking should be allowed to interfere with the progress of the primary work in which we are engaged, namely: the preparation of the restatements of the Common law. All of our energies must be bent to the accomplishment of that task at the earliest moment consistent with the best scholarship, the greatest accuracy and the most lucid information."

Chief Justice Hughes Addresses Meeting

Chief Justice Hughes addressed the meeting informally at the conclusion of President Wickersham's address. His remarks were also broadcast. He was more impressed each year, he said, with the prodigious character of the restatement of the law, as indicated by the multiplying drafts and revisions which had come to his desk. In the midst of so great a task, there might come a "time of discouraging reflection on the immense needs of the administration of justice and the extreme difficulty of finding a way by which human nature in administration can solve the problem which it creates." And there followed this trumpet call of faith and courage:

"In face of uncertainties and disappointments, one thing is sure, that we cannot afford to take a defeatist attitude. At the beginning of our government, how many cogent reasons could have been adduced to demonstrate the impossibility of welding into a nation the various colonies with their divergent interests, and how difficult must have appeared the successful working of a federal government of limited powers and the development of public affection for that government. How idle it might then have seemed to those who were suffering from the reaction of the revolutionary effort to assume that a supreme tribunal could possibly render decrees that would be accepted by disputing States jealous of their prerogatives and asserted rights. The most important lesson of the past is ever to strive and never to be disheartened because of the immensity of a necessary task."

In his address, which is published in full in this issue, the Chief Justice further gave a report of the labors of the Supreme Court of the United States, which is now abreast of its work, and spoke at some length on the Annual Conference of Senior Federal Circuit Judges—a valuable instrumentality which he is anxious to see further developed, "in connection with the administration of Justice in general, as distinguished from the mere consideration of the problem of congestion and the need of additional judicial assistance, to which the Act creating the Conference devotes particular attention." In discussing this subject, he said:

"The Conference has sought to avoid any question as to the scope of the authority which the Congress intended to confer upon the Conference, as such. And the Conference has thought it advisable that there should be an amendment of the statute creating it so that the Conference should be authorized explicitly to recommend to the Congress from time to time such changes in statutory law affecting jurisdiction, practice, evidence and procedure, in the different federal district courts and Circuit Courts of Appeal, as may seem desirable. The Attorney General, acting upon the request of the Conference, presented the matter to the Congress and bills to carry out the recommendation were introduced, but, due, I suppose, to the pressure of legislative work, the bills were not acted upon. I trust that legislation to carry out this important recommendation will be enacted by the next Congress."

Annual Report of Director Lewis

The annual report of William Draper Lewis, Director of the Institute, gave the members an accurate and detailed statement of the work done during the past year and of plans for the immediate future. The net result of the labors of the year was the presentation to the meeting of one revised and eight tentative drafts covering 1,335 pages. While real progress is not of course measured by hours of work or the number of pages produced, still the figures, he said, did give some idea of what had been accomplished. After a brief discussion of the things which he considered necessary to the completion of the Restatement, and an appreciative mention of the favorable report of the Special Committee of the Carnegie Corporation which had been charged with the duty of making an independent inquiry as to the Institute's work, Director Lewis proceeded to devote the greater part of his report to the "Work Done and to Be Done on the Restatement." He said:

Work Done and to Be Done

"Visualizing the First Restatement of the Law as divided into some sixteen Subjects to be published in approximately twenty-two volumes, it is appropriate to inquire the stage of the work at which we have now arrived.

"Of the seven Subjects on which we are engaged, three—Business Associations, Property, and Torts—measured by relative magnitude, are the major Subjects of the Restatement. Our estimate is that the first Business Associations, which includes Corporations for Profit, Partnerships, Common Law Joint Stock Companies and Business Trusts, will require three volumes; the second, Property, which includes Estates, Future Interests, Rights and Privileges of Owner of Land as to Physical Use, Conveyancing and Landlord and Tenant, will require five volumes; the third, Torts, which includes Intended Harms, Unintended Harms (Negligence, etc.), Deceit, Defamation and Interference in Business Relations, will require four volumes. Torts was one of the three Subjects work on which began in June, 1923, some four months after the formation of the Institute. Work on the other two Subjects has been going forward for several years, although we have not up to this time pushed the work on Business Associations. It is anticipated that we shall be working on all three of these Subjects for many years and that, therefore, the final volume of each Subject will be among the last to be published. On the other hand our work on Contracts, Conflict of Laws, Agency, and Trusts is nearing completion.

"Some eighteen months ago we determined to make our present chief concern the completion of the Restatement of Contracts at the earliest possible moment consistent with good work and publish it as the first volume of the Restatement; and also, on the publication of Contracts, to be in the position to publish thereafter at reasonably regular intervals the other volumes of the Restatement. It was further determined not to attempt to undertake any new Subject until the work on Contracts

and on Conflict of Laws and at least the Tentative Drafts of Agency were completed. As Contracts, Conflict of Laws, Agency and Trusts are completed, we shall increase the amount of work done on Property, Torts and Business Associations and begin work on other Subjects not yet undertaken for Restatement. It is of interest, therefore, to see now how near we are to completing our work on Contracts, Conflict of Laws, Agency and Trusts as well as to obtain some idea of the volume of work on the three major Subjects which has yet to be done.

Contracts

"In Contracts we submit this year for your consideration Tentative Drafts of the Chapter on Discharge of Contracts, on Fraud and Misrepresentation, on Duress and on Mistake, as well as a Tentative Draft of the Topic Restitution in the Chapter on Remedies. There remain the Chapters on Impossibility and Illegality and the third and last Topic in the Chapter on Remedies, the Topic Specific Performance. We shall submit these two final Chapters and Topic a year from now and in connection therewith a complete revise of the entire Subject of Contracts so that if you approve, the volume on Contracts may be published as soon as practicable after your adjournment.

"It is perhaps needless for me to state that this work on Contracts is during the coming year our major task in connection with the Restatement. Nothing will be allowed to interfere with the completion of the Subject.

"The publication of the Volume on Contracts necessitates a final determination of the use of words in connection with fundamental legal concepts as well as the use of many words and expressions of minor, but nevertheless, of very considerable importance as well as the determination of an infinite number of questions of form and style. Throughout the Tentative Drafts on all subjects the effort has been to preserve as great uniformity in terminology and matters of style as was practicable in the preliminary stages of the work. While we have been constantly approaching uniformity in these matters, there yet remain variations which should not appear in the official volumes, except perhaps in rare and easily recognizable instances. Therefore, decisions in regard to terminology, phrasing, form and style made in connection with the publication of the volume on Contracts will affect the entire Restatement.

Conflict of Laws

"The Reporter, Mr. Beale, and his Advisers completed the Tentative Drafts of this Subject more than two years ago. As explained in my Report last year, the difficulties pertaining to the Subject are such that the Council determined to delay its final publication until the publication of Contracts and in the meantime to leave nothing undone to secure accuracy. Last year we considered a revision of the first half of the Subject. Mr. Beale and his Advisers submitted to the Council last winter a revision of the Chapters on Property, Contracts, Obligation of Judgments and other Imposed Duties, and Procedure. The Council are submitting these Chapters for your consideration. The Conflict of Laws group is now working on the revision of the Chapter on Wrongs and the Executive Committee of the Council has still under consideration the chapter on Administration. Perhaps the title 'Proposed Final Draft' given to the revision submitted last year as well as to that submitted this year is misleading. In both instances the Drafts are submitted by the Council for suggestion and criticism and such action as you may care to take short of action which might be interpreted as final. I represent the desire both of the members of the group that has devoted so much labor to the Subject as well as that of the members of the Council when I say that as it will be another year before the volume on Conflict of Laws will be published we shall during the intervening time continue to give careful consideration to all suggestions for improvement.

Agency

"In connection with this Subject we submit this year a Tentative Draft of the Chapters on Liability of the Other Party to the Principal, Liability of the Other Party to the Agent and Liability of the Agent to the Other Party. With the submission of these Chapters there remain two chapters—one, that on the Duties and Liabilities of the Agent to the Principal, and the other, the final chapter, that on Liability of the Principal to the Agent. The Reporter, Mr. Seavey, and his Advisers are nearing the completion of their consideration of the first of these two Chapters and have already done some work on the final Chapter so that there is reason to expect that the Tentative Drafts of these Chapters will be before you next May. There will then remain to be done the work on the revision, a work which will probably occupy several months.

Trusts

"This year you have before you for your consideration Tentative Draft No. 2 which includes the Chapter on the Transfer of the Interest of the Beneficiary and the Chapter on Administration of the Trust—Relation Between the Trustee and the Beneficiary—Topics A and B. These Topics include General Principles and the Duties of the Trustee. The Reporter, Mr. Scott, and his Advisers have been working for some time on the remaining parts of the Chapter and on the next Chapter which deals with the Administration of the Trust—Liability to Third Persons. There still remain to be considered the Chapters relating to the Persons Bound by the Trust, the Termination of Trusts, Charitable Trusts, Resulting Trusts and possibly Constructive Trusts. Thus, unlike the other Subjects just mentioned, the work on this Subject will probably continue for the next three years.

Torts

"The first Tentative Drafts of this Subject cover those unintended harms which affect the person as distinguished from land or chattels. When the Reporter, Mr. Bohlen, and his Advisers completed the Tentative Drafts of the Chapters relating to these matters they turned to questions pertaining to unintended harms which includes negligence and related topics. Mr. Edward S. Thurston was appointed Reporter for the Chapters dealing with the unintended harms to property, our desire being to finish the matter which would be included in the first volume on unintended harms prior to the conclusion of the work on the second volume,

which, as planned, deals with unintentional harms of negligence and related topics. This year the Council are submitting for your consideration a Tentative Draft of the first Chapter dealing with invasions of interests of exclusive possession of land. We hope that the Tentative Drafts of the remaining matter to be included in the first volume of Torts can be submitted next year. The Council are also submitting a Tentative Draft of the Chapter on Liability of Employer of Independent Contractors.

"For some time Mr. Bohlen and his Advisers have been working on the difficult subject of legal cause commonly spoken of as proximate cause. They will be able to submit the result of their deliberations to the Council next December. Besides the matters just mentioned, the volume on unintentional harm, as planned, will also contain chapters on Contributory Fault including such matters as are usually called voluntary assumption of risk, contributory negligence, imputed negligence. When this is done that part of the Restatement which deals with what is called mere or ordinary negligence where the injury done is harm to the person will be completed. In order to include the entire field of liability for unintended harm the following matters will then remain for treatment: First, the extent, if any, to which the liability for negligent injury to land or chattels differs from the liability for negligent injury to the person; second, the extent, if any, to which a greater liability is imposed for 'reckless' or 'wanton misconduct' than for 'mere' or 'ordinary' negligence; third, 'ultra-hazardous' activities which though done with every practical precaution, are none the less carried on at the risk of answering for any harm done thereby. It will not, of course, be possible to submit for your consideration next year, besides the chapter on Legal Cause, all this remaining matter pertaining to unintentional harm. It is hoped, however, that the remaining work in connection with the preparation of the Tentative Drafts of this part of Torts will not take more than two years. As planned, the last two volumes of Torts will cover Deceit, Defamation and Interference in Business Relations.

Property

"We are submitting this year a Tentative Draft of the Chapter dealing with Life Estates, this being the concluding chapter of the division of the Subject relating to Estates which, in connection with the introductory matter, is, as planned, the first part of the Subject Property. The Reporter, Mr. Powell, has already begun work on Future Interests and a group of Advisers is being formed to assist him, though it is not likely that we shall be in a position next year to submit a Tentative Draft of any part of this Subject.

"As soon as our available funds permit we shall form another group to work on that part of the Subject relating to Rights and Privileges of the Owner of Land as to Physical Use and it may well be that prior to the expiration of our work on the First Restatement of the Law we shall have a third group working on this Subject.

Business Associations

"It is a regret that we do not have a Tentative Draft relating to this Subject to submit for your consideration this year. The part of the Subject on which we have been working relates to contracts for the creation of shares by an organized corporation which the corporation has no power to create at the time the contract is entered into, and to transactions for the creation of shares prior to the formation of the corporation. An important part of the first of these two matters is the application of the rules of contracts pertaining to misrepresentation and illegality. It was considered best to wait until the Council had considered the principles pertaining to both of these matters as presented by the group working on Contracts before presenting even in tentative form their application to situations in which corporations are involved.

"As I have been acting as Reporter for the Subject, the work has necessarily proceeded very slowly and this because of the many matters which as Director I must attend to. Indeed, I took up this work on Corporations in order to ascertain whether it was practicable to include a subject which had its origin in legislation in the Restatement of the Law. We have, I think, gone far enough to answer that question in the affirmative provided the matters treated in the Restatement are confined to what may be termed the common law which has been built up by the decisions of the courts around this type of association. Of course, the moment our funds permit we shall reorganize the work on the Subject so that we may have a Reporter or Reporters capable of giving an adequate amount of time to their work. As previously explained, this cannot be for the next two years. In the meantime, those of us who are working on the Subject hope to solve the more fundamental questions pertaining to two things, namely, what has been described as ultra vires and de facto corporations. If this can be done, we shall have at least smoothed the way for those who will be called upon to do the major part of the work on Business Associations.

Summary

"The foregoing account of the work done and to be done on the different Subjects which we have so far undertaken for Restatement enables me to say that there is every reasonable prospect of our being able to begin the regular publication of the First Restatement of the Law in the fall of 1932, and thereafter to continue at short and approximately regular intervals to issue the remaining volumes. In the eight years which have passed since the work began we have made our quota of mistakes, but we have not made the fatal mistake of belittling the seriousness of the work. We know that we are in the middle, not at the end of our task but that which most heartens us is the growing interest of the members of the Institute, of the judges and of the leaders of the bar generally. There is nothing that has been more helpful than the way in which state bar associations and faculties of law schools have taken hold of the state annotations. I shall leave to our Adviser on Professional and Public Relations to tell you what has been done, confining myself to the statement, that the success of the Restatement is in large part dependent on the willingness of state bar associations to make themselves responsible, with the co-operation of members of law school faculties, for the production of these annotations so that they can be

regularly published in connection with the publication of the official volumes of the Restatement."

Under the head of "Work in Criminal Justice," Mr. Lewis spoke of the three matters to be submitted for consideration at the meeting and announced that the donation of the Rockefeller Foundation had warranted them in undertaking also to produce a Model Act on Double Jeopardy—a subject involved in conflicting interpretations of constitutional provisions. The Council was not ready to submit a tentative Draft at this session, but looked forward to doing so next year. He concluded with the following statement concerning the "Joint Committee of the American Bar Association, the Institute and the Association of American Law Schools on the Improvement of Criminal Justice."

Joint Committee on Improvement of Criminal Justice

"At its meeting last August the American Bar Association adopted a resolution authorizing its Section on Criminal Law and Criminology to appoint representatives to confer with like representatives appointed by the American Law Institute 'on lines of possible co-operation for the improvement of criminal justice.' This invitation was accepted and action has since been taken to include on the Joint Committee representatives of the Association of American Law Schools. The Committee, therefore, represents the three principal national organizations of our profession.

"The discussion which took place at the first meeting of the Committee showed that if it was to deal adequately with the matter referred to it, it must first determine the scope of the term 'criminal justice' and the nature of the obligation of the legal profession as such in respect to its improvement. Having done this, the Report can deal with the respective functions of the American Bar Association and other bar associations, the Institute and the law schools as agencies of the profession in the performance of the profession's obligation to improve criminal justice and recommend specific things that should be undertaken.

"The appointment of this Committee is a step of great importance. In the first place it marks the growth of that spirit of cooperation between the bar associations, the Institute and the law schools which is essential if our profession is to perform those large services which the public have a right to expect. In the second place, the personnel of the Committee gives us a right to expect from it valuable guidance as to the principles to be followed if constructive work for the improvement in criminal justice is to be done. As now constituted, the membership of the Committee represents much of the best constructive work in the field of criminal law and administration which has been done in the last decade. It is the present expectation of the Committee to present their Report (it may be followed by other Reports) to the three organizations represented next fall."

Report of Adviser on Professional and Public Relations

Mr. Herbert F. Goodrich, Adviser on Professional and Public Relations, presented a report dealing with the "Code of Criminal Procedure," "Plan for Publication of Restatements," "Progress in State Annotation Work," and "Professional Information Concerning Institute Work." On the first subject he said, in part:

"It is not part of the scientific work of the American Law Institute to urge the Code of Criminal Procedure upon legislatures and legislative committees. We do not think that the Institute should tell states what they should do about criminal procedure. Such participation in local affairs might assist the passage of a bill in a particular instance, but in the long run it would tend to divert us from the great cause of the improvement of the law for which the Institute is organized. We will cooperate with the organized bar in any state. But the initiative, especially in matters concerning legislation, must come from that bar and not from the Institute.

"At the same time, if all this thought and effort, which has been given to the Code of Criminal Procedure by those in the country who know most about it, is to have any effect in improving the law, the work cannot stop with the adoption of the Code with approval by the Institute. It must not be a flower which is born to blush unseen and waste its fragrance upon the neglected shelves of reference libraries. It is not, as we all know, enough to have the best Code that can be drawn up. For that Code to become the law there must be a carefully planned campaign for its adoption by a legislature.

Program in Connection with Code Suggested

"This is the kind of situation in which we naturally turn for help to our members and to the Cooperating Committees of State Bar Associations who have been of such tremendous help in everything which the Institute has been doing. I have suggested to the chairman of every Bar Association Cooperating Committee the following program in connection with the Code: (1) There should be in each state a committee of interested lawyers who will assume responsibility for doing whatever should be done with the Code in that state. This committee need not necessarily be the same committee as that very helpful one known as the 'Cooperating Committee.' The Cooperating Committees are functioning splendidly in the matter of local annotations and should not be expected to assume too great a burden. In many instances the members of the Cooperating Committee are lawyers who have no expert knowledge of or particular interest in Criminal Procedure, except as they are generally interested in anything which works for the improvement of the law. In such instances a special committee on the Code should be appointed and the Cooperating Committee has been asked to assist in securing the appointment of such a committee in each Bar Association. The committee chosen should be composed of persons with particular interest in the subject of criminal procedure. (2) The state committee should decide both upon the advisability of present steps to reform the criminal procedure in the state and the best means of effecting that reform. In some states there have recently been thorough revisions of criminal procedure rules. This is the case, for instance, in Louisiana, California and Michigan. In such states it would doubtless be undesirable to urge any general change in the rules of criminal procedure at

the present time: the question will be whether the Institute's Code has in it any features not contained in the local revision that should be brought to the attention of the legislature. In other states the local political situation or the necessity of getting some other piece of work first accomplished may make it advisable to defer active effort in securing adoption of this Code. In one state an interested committee has believed that the establishment of a judicial council is immediately more important than anything else and that if this could be accomplished other matters could proceed much more rapidly. All problems of this type the Institute should clearly avoid and the determination of questions of when and how should be left to the local committee. The main thing is that there be a committee of interested persons who have the matter definitely in mind. (3) The Institute should assist this local committee. It can give information about the Code. It can and will send a representative to meet with a local bar association and legislative committee to explain its provisions. It can send, and has in several instances sent, memoranda showing how the adoption of the Code would change the existing rules of criminal procedure in the state.

"We have on hand, for distribution where it would be helpful, several types of information about the Code. The first is a small booklet for general distribution. It is similar in size to our little pamphlet about the Institute called 'A Short Summary of Pertinent Facts.' This pamphlet is written in non-technical language in the hope that it would give an intelligent description of the Code to either interested lawyers or laymen. Then we have a fair sized number of copies of the Code without annotations, simply giving the text in official form. Finally, we have a large volume which gives the text of the Code and all of the annotations revised up to date. The annotations give references to analogous statutory provisions in the present laws of the various states. They represent a tremendous amount of hard and accurate work. It is obvious that this last volume is too expensive to make any general distribution thereof. But it can be furnished for the information of committees whose interest has reached the point of wanting exact technical information."

Plan for Publication of Restatements

The plan for the publication of the Restatements, through a cooperative arrangement with the West Publishing Company and the Lawyers Cooperative Company, was next set out. Its details, as far as they have been determined, have already been printed in the JOURNAL. Friends of the Institute, said Mr. Goodrich, had raised "the very pertinent question whether this arrangement does not simply turn over the work of the Institute and the Bar Associations to the law publishing houses. The question has been honestly and fairly put and should be as honestly and fairly answered. That our associates, the law publishers, will make a fair profit out of this venture we hope and expect. They cannot run a business enterprise without profit. If there is a profit the Institute will share it and the Institute's share will go back into the work of improvement of the law. If there is no profit the publishers agree to shoulder the loss. Throughout the conduct of the enterprise the Institute has a voice as participant. Thus the situation is quite different from that between author and publisher and the ordinary royalty arrangement. We shall be in possession of all the facts. We have a voice in the determination of policies. And, finally, if our plan does not work satisfactorily we can, upon reasonable notice, withdraw and make some other arrangement.

"Many details regarding the operation of the American Law Institute Publishers necessarily remain unsettled. The exact form and style of our volumes have not been finally settled upon, although a great deal of work has been done upon it. The volumes will have dignity and durability. We do not know what the price will be. But we are agreed that it will be not as high as we can get, but rather as low as we dare make it. In view of the great care with which every detail of this plan has been thought out and considered not only by the Director and myself, but the members of the Council as well, we feel confidence in assuring both the members of the Institute and our friends in the Bar Associations that their contributions, whether of legal brains, or money, or both, will be effectively used, not to enhance the profit of commercial publishers, but in furtherance of our project of improvement of the law."

State Annotation Work

Mr. Goodrich's report has this to say on the accomplishments and prospects in the State Annotation Work:

"We are now getting the benefit of the cumulative effect of all the work earlier done in the state annotation project. It is better understood than it has ever been. The work moves forward with increasing smoothness and understanding in the various states. The methods of organization and doing the work vary, naturally, in each state. In most it is being done in cooperation with local law schools. In others, especially those where there is no law school, it is being done by members of the bar. The speed of the work, naturally, varies.

"Since Contracts will not be finished this year, as it was at one time thought, there is additional time for the preparation of state annotations for that subject. Contracts will be the first of the Restatements to appear in official form. The first step in the local annotation project, therefore, is to organize and complete local annotations for the Restatement of Contracts. Without making estimates unduly optimistic it is believed that we are safe in saying that we may count upon Contracts annotations to accompany the official Restatement upon its appearance in the following States: Alabama, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming —thirty-six.

"The states not included in the list are as follows: Arkansas, Arizona, Delaware, District of Columbia, Georgia, Iowa, Maine, Mississippi, Montana, New Hampshire, New Mexico, Nevada, Utah

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ADDRESS OF PRESIDENT WICKERSHAM

GENTLEMEN of the American Law Institute: Since the last annual meeting there have been four changes in the Council of the Institute. To our great regret, as was announced at the last meeting, Chief Justice Hughes found it necessary to retire and Mr. Thomas J. Parkinson, of New York, was elected to fill his unexpired term.

Three members of the Council were removed by death; John G. Milburn, Henry M. Garwood and Thomas W. Shelton. Mr. Milburn had been associated from the beginning with the movement of ideas that brought this Institute into being. He was one of the group of lawyers who constituted themselves a Committee on the Establishment of a Permanent Organization for the Improvement of the Law, and was associated with the report submitted to the meeting of lawyers held in Washington on February 23, 1923, which, following its recommendation, created the Institute. He was one of the original Council of the Institute. He continued until his death in August, 1930, a member of the Council and Executive Committee. He was Chairman of the Ways and Means Committee that presented the project of the Institute to the Carnegie Corporation, on the basis of which was made the generous grant that made our work possible. He was indefatigable in his labors in our behalf, constant in attendance upon the meetings of the Institute and of its Council and Executive Committee, and unsparing in his devotion to our interests. Mr. Garwood was elected to the Council in 1924, when its number was increased from twenty-one to thirty-three. Living in Texas, he could not give intimate attention to the details of our work, but he was faithful in his attendance upon the meetings of the Council and his position and influence in the State where he lived enabled him to create and stimulate interest in our program in that part of the country. Both Mr. Milburn and Mr. Garwood were lawyers of great experience, who had won high position in their respective communities. As was said in the Minute adopted by the Council: "Both were men of force and power and authority, and yet both exhibited in their manner a gentleness, a courtesy, a simplicity and a humor that won friendship and affection."

Mr. Shelton was one of the latest comers into the Council. A lawyer in active practice in Virginia, he brought to the consideration of the restatements the criticism of a well informed and practical mind. He was present and took an active part in the meeting of the Council in February last, and his vigorous personality at that time conveyed no slightest intimation of the sudden death that was to overtake him shortly afterwards.

The vacancy created by Mr. Garwood's death was filled by the election of the Honorable George Wharton Pepper, of Philadelphia; that caused by the death of Mr. Milburn by the selection of the Honorable Charles C. Nott, Jr., of New York; that caused by Mr. Shelton's death by the choice of the Honorable Newton D. Baker, of Cleveland, Ohio. All of these elections by the Council hold only until this meeting and are submitted to you for your action.

This meeting marks the close of the eighth year of our existence. Naturally it may be asked if we have made as much progress during that period as the Bar had reason to expect.

Let me recall to you the forecasts of those who planned this work and sought financial assistance for its accomplishment.

The Council of the Institute, in laying its project before the Carnegie Corporation in March, 1923, stated that it had no desire to minimize the labor, time or expense involved in the restatement of the law. "As a scientific, constructive legal work," they said, "there has been nothing to compare with it, not even the work of framing the Napoleonic Code, since, under the direction of Justinian, the Roman Law was given systematic expression." The Council said that unless the work could be undertaken in a large and serious way it should not be undertaken at all. They therefore asked the Carnegie Corporation to consider making a sufficient appropriation to guarantee the continuance of the work for ten years, expressing the opinion that that period should be sufficient to enable the Institute to issue restatements covering a considerable portion of the more important branches of the law. The Council also expressed the belief that in that period the great value of the work could be so demonstrated as to show the necessity of establishing the Institute "as a permanent agency operating to improve the administration of justice by making the law clearer, simpler and better adapted to the needs of life." The Carnegie Corporation responded to this application, also in "a large and serious way," by appropriating to the use of the Institute, for its general purposes, the sum of $1,075,000, payment whereof should be distributed over a period of ten years, substantially at the rate of $110,000 a year, the final payment to be made for the first half of the fiscal year 1932-33.

The Council of the Institute thereupon determined to enter upon the work of preparing restatements of the laws of Contracts, Torts, Agency, Conflicts of Laws and Business Associations. Reporters and advisers for these subjects were appointed and the work was commenced. By May, 1926, there had developed the fact that, as the Director reported, the greatest difficulty in the production of any restatement of the law was not so much the conflicting decisions between courts, as the selection of the terminology, at once clear and adequate, not merely for the expression of the law of any particular subject but for the restatement of all subjects. Moreover, from the mere rôle of critics or advisers, the men assisting the Reporters in their work in effect had come to be colaborers with them, and the restatements had become products of the collaboration of groups. The time spent in conferences on each subject had lengthened, and the result, as the Director reported, was better work

on the preliminary drafts—that is, the drafts preceding the tentative drafts which are submitted by the Council to the annual meeting—more time spent in conferences and a greater volume of production. In view of this development, and in order to keep up the momentum developed and to add other subjects for restatement, the Council petitioned the Carnegie Corporation to readjust its promised payments of instalments of the total sum appropriated, so as to increase the annual payments and shorten the time of final payment. The Carnegie Corporation, with generous consideration, granted this request and on May 28, 1926, notified us that it agreed to an increase of the annual payments for the fiscal year October 1926-1927, and for the four successive years thereafter, from $110,000 to $140,000, and for the first half of the fiscal year 1931-32 the final payment of $15,000, which would complete the entire payment of the grant on May 1, 1932.

The Institute thereupon added the subjects of Trusts and Property to those restatements of which had been undertaken, and appointed reporters and advisers to prepare them. The original grant from the Carnegie Corporation therefore would have been substantially exhausted by the end of the year 1931. In order to plan for future work, the Council in December, 1929, made a report to the Trustees of the Corporation, showing the progress made in the work on the restatements and requesting a renewed grant large enough to enable us to complete the principal subjects of the common law.

As reported to the Institute at its last annual meeting, the Board of Trustees of the Corporation, on February 19, 1930, adopted resolutions expressing its satisfaction at the progress made by the Institute in its work of restatement of the law, and its wish to continue its part toward the accomplishment of that work. It further resolved to make an independent inquiry, by a special committee, into the question whether improvements might be practicable, either in economy or efficiency, in the work of restatement, and, pending the report upon such inquiry, the total of the unexpended balance of the Corporation, presently available for appropriation, amounting to $249,209.40, was set aside so as to be available specifically for our undertaking.

The Special Committee so appointed, on May 7, 1930, submitted to the Board of Trustees of the Carnegie Corporation a Report in which it said: "We are happy to be able to report that in our opinion the Corporation has good reason for looking with satisfaction upon the progress which the American Law Institute has made in its work of restatement of the law, and is wise in wishing to continue the part of the Corporation toward the accomplishment of that great and important work. We believe that the American Law Institute is doing the work economically and efficiently."

The Committee also made certain recommendations with respect to the work. The Council of the Institute, at its meeting on December 18-21, 1930, adopted resolutions recording its appreciation of the action of the Trustees of the Corporation in appointing a committee to make an independent inquiry into our work on the restatement of the law, and our appreciation of the spirit of helpfulness which marked all the actions of the Committee; a spirit which was manifested in the report submitted to the Trustees of the Corporation.

"It greatly encourages us in our arduous undertaking," said the Council, "to learn that the Committee was able to commend the progress we have made on the restatement and to declare it to be their belief that we are doing the work 'economically and efficiently.'"

The Council also took appropriate action to carry out the recommendations of the Special Committee, except in particulars specified in the resolutions where there seemed to be adequate reason for a somewhat different procedure. On December 6, 1930, we were advised by the President of the Carnegie Corporation that in arranging our budget for 1931 we could count on the receipt from the Corporation of $155,000, and also, for a like sum in the calendar year 1932. The matter of financing the continuance of our work after 1932 is still under consideration. The Director reported to the Council, at its meeting in December last, as follows:

"The next two years are critical years in the work on the restatement. They should witness the completion of the subjects, Contracts, Conflict of Laws, Agency, Trusts, the greater part of the first two volumes of Torts, as well as the beginning of the publications of the final volumes of the restatement. The regular publication of the final volumes should not be delayed any longer than is required by the necessity for the greatest care and thoroughness."

The Director further emphasized the importance of seeing to it that before publishing the first volume, work on the volumes immediately following should be sufficiently advanced to make certain reasonable regularity of publication. On the whole, it appears reasonably certain that, as the Council of the Institute stated in its original application to the Carnegie Corporation in May, 1923, for aid in carrying on its work, within the period of ten years from beginning its work the Institute will be able to reissue restatements covering a considerable portion of the more important branches of the law, and we believe now, as the Council did then, that within the next two years—which will be within the ten-year period referred to—the great value of the work will have been so far demonstrated as to show the necessity of establishing the Institute as a permanent agency operating to improve the administration of justice, by making the law clearer, simpler and better adapted to the needs of life.

Already, although but one-half of the restatement of the law of Contracts has been published in definitive form, the profession is using our incompleted work in increasing measure. 48 tentative drafts and 252 Preliminary drafts of Restatements thus far have been published. 43,233 copies of Tentative drafts have been sold to Law Schools for use by teachers and students. 27,462 have been sold to members of the bar.

The 252 Preliminary drafts published to May 1st, 1931, are distributed among the following subjects: Agency 38, Business Associations 17, Conflict of Laws 35, Contracts 59, Torts 45, Property 35, Trusts 23. Both the Tentative and the Preliminary drafts are being used increasingly by teachers, law school students, lawyers and judges. They are frequently cited in the opinions of Appellate courts. This use of even the tentative and im-

perfect work affords assurance of the general and widespread demand for the Restatements and a promise of the reception which the completed work will receive at the hands of the legal profession.

While the immediate and dominant purpose of the foundation of the Institute was the restatement of the Common law, this was not its sole object. The Certificate of its Incorporation defines its particular business and objects to be educational, "and are to promote the classification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scientific legal work."

At the organization meeting on February 23, 1923, the late and lamented Governor Hadley offered a resolution requesting the Council to give prompt and careful study to the need and practicability of a restatement of substantive and procedural criminal law and if found desirable and practicable to proceed to such restatement. The resolution was not adopted, but one of the earliest acts of the Executive Committee was the appointment, on May 19, 1923, of a committee composed of Governor Hadley, John G. Milburn, and William E. Mikell, to prepare and present to the Council a draft of a survey and statement on the defects in criminal justice. That committee, after two years' consideration, on April 1, 1925, submitted a report to the Council, in which it stated that after a careful study of all of the data found to exist and making generous allowance for inaccuracies, it was convinced that this data showed undoubtedly the following facts:

First, there is more crime in this country in proportion to population than there is in England or Canada.

Second, that a much larger proportion of those who commit crimes are not apprehended in this country as compared with the two countries mentioned.

Third, a larger proportion of those who are prosecuted for crimes in this country escape conviction or punishment than in England or Canada.

Fourth, viewing our situation from our own standpoint and not in comparison with other countries,

1. There are altogether too many crimes committed by those who are not apprehended.
2. There are altogether too many offenders who are not indicted.
3. There are too many indicted who are not tried.
4. Too many of those who are prosecuted are not committed and too few are convicted.
5. Too many of those who are indicted escape conviction, prosecution or punishment in ways other than by acquittal.

The report elaborately reviewed defects in criminal justice due to causes other than defects in law or procedure. It also devoted considerable space to defects in the law of criminal procedure and to the uncertainties and inconsistencies in the substantive criminal law in the United States. As a result of its studies, the committee recommended: first; that the American Law Institute undertake a restatement of the substantive law of crimes; second, they reported that they regarded a Code of Criminal Procedure as practicable and desirable but did not recommend that its preparation be undertaken by the Institute under the then existing conditions, because a Code of Criminal Procedure is primarily legislative in character, rather than a restatement of existing law, and the Institute was founded and its present funds secured primarily to make a restatement of the common law. The work of preparing a model Code of Criminal Law Procedure was however thought to be of great and immediate importance. "It is a work" the committee said, "which deserves consideration by those entrusted with the administration of funds for the improvement of social conditions." The Council of the Institute thought the preparation of a Code of Criminal Procedure was of immediate importance, and being generously provided by the Laura Spellman Rockefeller Memorial with funds to finance the effort, it appointed Reporters and caused such a Code to be prepared. The Code was finally approved at the last annual meeting, and has been widely distributed. Portions of it have already been enacted as law in at least five states.

It would seem now to be timely to revert to a consideration of the primary recommendation of the Hadley Committee that the Institute should undertake the preparation of a restatement or Code of the substantive law of Crimes.

The Committee on the Establishment of a Permanent Organization for the Improvement of the Law, in its report, expressed the opinion that the two chief defects in American law are its uncertainty and its complexity and that the most serious consequence of these defects is that they create a lack of respect for law, which, "whether it has its origin in the law's uncertainty or in the injustice of its provisions, undermines the moral fibre of the community."

The Hadley Committee expressed a similar opinion, but emphasized the fact that a restatement or revision of the Criminal law could only remedy faults due to defects in the law itself and not those due to the human element in its administration. Nevertheless they thought that the restatement of the substantive criminal law in a manner to promote its greater certainty, and the production of a model Code of criminal procedure, would remove many of the existing just complaints of the unnecessary technicalities and delays in the administration of the criminal law.

No one who follows with any thoughtful attention the occurrences of our daily lives can fail to note the existence of a widespread lack of respect for law. Many reasons are ascribed for it, other than those noted in the reports referred to. Probably every class of the Community sees the roots of that attitude in the defects of other classes. But of the fact there can be no doubt. The President of the United States, in his inaugural address, on March 4th, 1929, declared the most malign of all the dangers to self-government today to be disregard and disobedience of law. "Crime is increasing. Confidence in rigid and speedy justice," he said, "is decreasing." That this general disregard for law is limited to no one class of laws is abundantly established. A survey of crime conditions in the United States made by a leading Insurance Company, as of July 1st, 1930, based upon reports from the heads of police departments of 88 cities, stated that in the previous ten years, arrests for crimes such as robbery, burglary and

theft had increased 212.04%, violations of traffic laws, 334.03% and for intoxication and liquor law violations, 161.38%. That Company concluded from its investigations that arrests for robbery, burglary and theft had increased in percentage more than ten times as much as the population; for traffic law violations, more than sixteen times as much, and because of intoxication and liquor law violations, more than seven times as much. It notes that the great increase in traffic law violations is due to the increase of more than 187% in car registrations during the decade and the greater stringency of traffic laws. Such facts as these challenge the legal profession more sharply than any other class of the community, for lawyers dominate legislatures, are perhaps more influential than any others in political organizations and necessarily are in more intimate contact with the machinery of law enforcement. They may not have the same power in moulding public opinion as in earlier times, but they certainly are not without influence. There are many signs of an awakening to a realization of their responsibility. The reports of Judicial Councils, Crime Surveys, Citizens Committees and Bar Associations witness to it. The matter has got beyond the mere machinery of criminal justice. It has become a public habit of mind. It is painfully evident in the rapid increase of juvenile offenders. It is shockingly so in the almost jocular current allusions to the pirates who prey upon legitimate business by systems which have become recognized and classified as "rackets." Perhaps the daily accounts of criminal acts which we read in the public press have dulled our sensibilities, so that we do not take home to ourselves the sinister significance of these constant manifestations of contempt for law.

The particular function of this Institute in this matter lies in resort to that purpose expressed in its charter, "to secure the better administration of justice." If punishment followed swiftly and certainly upon crime, there would be assuredly more respect for law. The model Code of Criminal Procedure was prepared in the hope that it might aid to this accomplishment. Perhaps this Institute may not be able to go beyond that. Yet with its organization and the technique it has developed, it would seem qualified, with appropriate support, to undertake such a restudy of the substantive law of crimes as was contemplated by Governor Hadley in the original resolution offered by him at its organization meeting. "No country," he then said, "can view with complacency a continued increase in the rate of crimes out of all proportion to the increase in population." The defects in the laws of criminal procedure, he admitted, did not constitute the only cause of the failure to check crime. "There is the cause of the inexperienced prosecutor; there is the cause of the inefficient police department; there is the cause of the hypercritical appellate court; but over and above all that is the question as to whether our system of criminal jurisprudence is as certain, as definite and as exact as it should be. . ." And in challenging terms, expressed with an earnestness unforgettable by those who heard him, he added that if we should fail to respond to that leadership which is now demanded of our profession by the American people, if we should not undertake to deal with a situation which in his opinion challenged the existence of our civilization itself, we should disappoint the hopes and expectations of the entire public. There has been recently an awakening of the Bar to this condition. The American Bar Association at its last annual meeting authorized the Chairman of its section on Criminal Law and Criminology to appoint a Committee to confer with the Institute on lines of possible cooperation for the improvement of criminal justice. A like Committee was thereupon appointed by the Council of this Institute. On December 29-31, 1930, the Association of American Law Schools authorized its Special Committee on a Survey of Criminal Procedure and the Administration of Criminal Justice to cooperate with these Committees. The representatives of the two Associations welcomed this cooperation. A Sub-Committee of the joint committee of the three associations mentioned has prepared a draft report which is to be considered at a meeting of the full joint committee during the period of this meeting. It is hoped that from this joint committee may come a definite plan of action which shall respond to the challenge made by Governor Hadley eight years ago.

The time for such action is peculiarly opportune. The work of the Commission created by President Hoover in 1929 to study and report upon the problem of the enforcement of laws will come to an end with the expiration of the congressional appropriation for its work on June 30th, 1931. During the two years' period of its existence, it has caused studies to be made by many qualified persons into such subjects as Police, Prosecution, Courts, Probation, Prisons and Parole, Criminal Statistics, Criminal Justice and the Foreign Born, Causes of Crime, Cost of Crime and Juvenile Delinquency, Lawlessness of Government Officials, besides the controversial subject of Prohibition—public interest in which largely has overshadowed any attention to these other topics. Reports on the subjects mentioned will shortly be issued. It is believed that they will contain much useful and accurate information and make recommendations of legislative and administrative action which should be helpful in the problem of ensuring better law observance.

Two years is all too short a time in which to make thorough and searching investigations into the effect of law, or lack of law, or into the social problem involved in the present unsatisfactory condition of observance and enforcement of our criminal law. It has taken this Institute five years of continued effort by highly qualified experts to produce a model Code of Criminal Procedure. It will require considerable time to probe the various causes of the public attitude towards the laws of the land and to prepare and submit remedies which will withstand the criticism and attacks of those affected by them. The work of the National Commission should be of great value to those who undertake such further effort. Indeed, some such body as this Institute must undertake the necessary constructive follow-up work, if the labors of the National Commission are to fructify into the most useful results. It is my hope that this Institute may be enabled to undertake a part at least of that task. Of course, no new undertaking should be allowed to interfere with the progress of the primary work in which we are engaged, namely:

the preparation of the restatements of the Common law. All of our energies must be bent to the accomplishment of that task at the earliest moment consistent with the best scholarship, the greatest accuracy and the most lucid formulation.

Such a restatement of the Common law was considered by Sir Matthew Hale, in the Seventeenth Century, to be "a Great and Noble Design which would be of Vast Advantage to the Nation." But, he wisely said, it was too much for a private man to undertake; "It was not to be entered upon but by the command of a Prince, and with the communicated endeavors of some of the most eminent of the Profession." It is being carried on today with the princely aid of a great beneficent foundation, by "the communicated endeavors of some of the most eminent members of the Profession."

That the results will prove "of advantage to the nation" is indicated by the increasing use which is being made by bench and bar of even the incomplete and imperfect portions of the work already published. A study and restatement of the substantive law of crimes made with the same care, study and thorough consideration as the restatements of the Common law might in like manner prove of great public usefulness. The project should be considered with care and should be undertaken only if it should not in any way interfere with the progress of the Common law restatements; and if it be adequately financed. In all these efforts, the lawyers of the country are endeavoring to do their part in the establishment of justice and the assurance of domestic tranquility. Constitutions and laws are but vain things unless back of them lie the determined will of a free people to respect and to compel respect for a law as the fundamental condition of an ordered social life.

ADDRESS OF CHIEF JUSTICE HUGHES

FOLLOWING the practice happily inaugurated by my distinguished predecessor, Chief Justice Taft, I avail myself of the privilege of extending to you a most cordial greeting. Your annual consultation is coming to be the spring meeting of the American bench and bar. The contagion of your influence has spread, so that the by-products of your labors may be fully as important as their direct results. I am impressed more each year with the prodigious character of your task in the restatement of the law, as indicated by the multiplying drafts and revisions which come to my desk. In another sphere of activity, under the guidance of your versatile and indefatigable Chairman, there has recently been issued a report appropriately emphasizing the need of suitable statistics to record the efficiency or inefficiency of the administration of justice. I trust that you may be spared the extension of this statistical ingenuity to ascertain to what extent the members of this distinguished body have actually and adequately analyzed and mastered the elaborate legal studies which the Institute is putting forth. You are fortunate in your mentors and in these opportunities for conference in which their reports and drafts are put under the scrutiny of those most competent, by reason of knowledge and skill in judgment, to criticise them.

In the midst of a task so great as this, there may come a time of discouraging reflection upon the immense needs of the administration of justice and the extreme difficulty of finding a way by which human nature in administration can solve the problems which it creates. In face of uncertainties and disappointments, one thing is sure, that we cannot afford to take a defeatist attitude. At the beginning of our government, how many cogent reasons could have been adduced to demonstrate the impossibility of welding into a nation the various colonies with their divergent interests, and how difficult must have appeared the successful working of a federal government of limited powers and the development of public affection for that government. How idle it might then have seemed to those who were suffering from the reactions of the revolutionary effort to assume that a supreme tribunal could possibly render decrees that would be accepted by disputing States jealous of their prerogatives and asserted rights. The most important lesson of the past is ever to strive and never to be disheartened because of the immensity of a necessary task. The ultimate goal may seem ever to recede as we advance, but we press on. Your endeavor is to provide a helpful, if not absolutely authoritative, restatement of the law and thus to diminish the area of ignorance and futile controversy. While this touches only one of the problems of the administration of justice, you have stimulated efforts to deal with others. The distinctive feature of our day is that through surveys, institutes, and judicial councils, we are making an exhaustive catalogue of evils. As a result, specifics will gradually be found, and at least we have the most interesting of all occupations in trying to find them. Nor will our expert devotees of research stop with the shortcomings of judicial proceedings. Eventually even legislative inefficiency may receive attention, not simply in the recriminations of political campaigns, or in futile harangues on the multiplicity of laws, but in the intelligent devising of improved methods. Studies by institutes of human relations may bring us gradually to a better understanding of the way in which laws actually work and to more successful adaptations of remedies to social requirements. When we consider the forty-eight stations devoted to somewhat inexpert experiments upon the body politic, we may marvel that the victim of so many operations gets on so well.

In the field of endeavor with which I have the

honor to be associated, I am glad to be able to report a measure of progress. On Monday last, the Supreme Court finished the hearing of arguments for the Term, and we are now engaged in deciding the controversies that have been submitted. We are as nearly up to date in the hearing of cases on our docket as is practicable. Taking the cases that have been argued and submitted on their merits, we have disposed of a considerably larger number than at the preceding Term. At this moment there are only about twenty-four cases on the docket (counting as one those cases which are brought together as a single controversy) in which jurisdiction on appeal has heretofore been noted or writs of certiorari have been granted. Of these, several are cases in which writs of certiorari were granted as late as April, and there is only one case in which jurisdiction had been noted prior to March of this year, and that case could have been heard had the parties been ready. The Supreme Court is abreast of its work.

In these days of surveys and judicial councils, the potentiality of the Annual Conference of the Senior Federal Circuit Judges should not be overlooked. I am anxious that this instrumentality should be developed. At the Conference last September, we had under consideration, in view of the congestion in the Federal district courts, the necessity of obtaining more judges. Here, as in connection with other problems, we found, upon examination, that we were confronted with a more fundamental question than that of immediate relief. For reasons not difficult to understand, there have been proposals for the creation, not simply of additional judgeships, but of additional districts, involving the provision of the offices and facilities essential to the equipment of new districts. Instead of dealing with this question in a casual and limited way, the Conference thought that the time had come for a comprehensive survey to ascertain the best means of promoting the economical and efficient administration of justice in the federal courts, whether by divisions of districts, consolidation of districts, or creation of new districts. This question should be dealt with in a thorough-going and scientific manner, so far as is possible in view of the difficulties created by local sentiment and tradition. We need a competent survey and report. The Conference requested the Attorney General to make a study of the subject, including the possible consolidation or change of existing districts and divisions with estimates of cost and efficiency, and report to the Conference at its meeting next fall.

With respect to the pressure for the creation of additional district judgeships, as distinguished from additional federal districts, the Conference referred to the limitation created by the Act of September 14, 1922, which created twenty additional district judgeships, but with the provision that, as vacancies occurred, these should not be filled without a special act of Congress. Experience has shown that the need was not temporary but permanent. Instead of litigation decreasing, it has increased. It was found that, in every instance but one, where a vacancy had occurred, there had been no question of the need of continuing the judgeship, but the time involved in getting the necessary special act through Congress had caused delay and congestion. The Conference, therefore, recommended that in the fourteen instances of vacancies that have occurred or will occur in these judgeships, the limitation should be removed and these judgeships should be made permanent. The Congress has not yet acted upon this recommendation. The Conference of Senior Circuit Judges, after careful consideration, also recommended additional district judges in five districts, and that no further provision for additional district judges should be made. Save in one instance, the additional judgeships thus recommended have not as yet been provided. There have been, however, three additional judgeships provided for other districts.

The Conference noted the inadequacy of the present statistics of the work in the Federal district courts, a subject which has recently received attention, so far as criminal statistics are concerned, in the report of the National Commission on Law Observance and Enforcement. This report as you have doubtless noted makes a very serious criticism of the criminal statistics published by the Federal Government. There are major defects with respect to classification. There are serious omissions in relation to the disposition of cases. The bases selected are such as frequently tend to mislead rather than to give an accurate view. The recommendation is made that there should be a central statistical bureau. The report makes it evident as it seems to me that we can expect but slight if any improvement in our statistical methods unless an adequate organization is maintained for this purpose in the Department of Justice, with a supervising staff through which accurate, comprehensive and uniform statistics can be obtained. Pending such an organization, some improvement may be possible, but I do not think that it will amount to much. It is easy to exaggerate the value of mere compilations of figures as to judicial administration, even assuming that they are carefully compiled, but there is no reason to doubt that we should have access to trustworthy information as to the handling and disposition of cases so that at least we may avoid inconsiderate generalizations and the adoption of unintelligent proposals. But ambitious schemes for tabulating the work of the federal courts will inevitably fail, in my judgment, if they are left to be worked out in the various federal districts without constant expert supervision, and for that supervision it will be necessary to have a central, well informed and continuously active agency.

The Conference of Senior Circuit Judges also took into consideration the question of developing its work in connection with the administration of justice in general, as distinguished from the mere consideration of the problem of congestion and the need of additional judicial assistance to which the Act creating the Conference devotes particular attention. It has been the practice in respect to the matters of congestion, additional judges, etc., as to which the Conference has made recommendations, to include these recommendations in its report which was placed in the hands of the Attorney General and embodied by him in his report to the Congress. The Conference has sought to avoid any question as to the scope of the authority which the Congress intended to confer upon the Conference, acting as such. And the Conference has thought it advisable that there should be an amendment of the statute creating it so that the Conference should be authorized explicity to recommend

to the Congress from time to time such changes in statutory law affecting jurisdiction, practice, evidence and procedure, in the different federal district courts and circuit courts of appeal, as may seem desirable. The Attorney General, acting upon the request of the Conference, presented the matter to the Congress and bills to carry out the recommendation were introduced, but, due, I suppose, to the pressure of legislative work, the bills were not acted upon. I trust that legislation to carry out this important recommendation will be enacted by the next Congress. If the work of the Conference is thus developed, I trust that it may be possible to secure the general cooperation of the bench and bar in a manner perhaps similar to that which was successfully followed when the revised federal equity rules were adopted. We await with keen interest the result of the comprehensive survey of the business of the federal courts which is being made by the National Commission.

The more we study the problems of organization and method, and appreciate the necessity of improvements in these respects, the more sensible we are that such improvements can serve only to clear the way for the essential judicial service which no sort of mechanization can supply. Uncertainties inevitably reside in the countless variations of human conduct and disputes will continue to arise in a myriad of instances. Somewhere must be found the acute, patient and expert analysts of facts and the discriminating judgment which not merely states but specifically applies the law. For this service there is no substitute. Learning, experience, intelligence and conscience are the pillars of Judicial administration. With these, we may measurably succeed, despite many hindrances, and without such essential supports, collapse and failure are inescapable. The beneficent result of the work of this Institute is not simply in drafts or projects, admirable as these may be, but in the exceptional discipline involved in their preparation and discussion. As we seek to improve the methods and facilities of our work, we train ourselves to a higher degree of competence for the unending and inspiring task to which as members of the bench and bar our lives are devoted.

DEPARTMENT OF CURRENT LEGISLATION

Regulation of Public Utility Holding Companies

BY JOSEPH P. CHAMBERLAIN

THE rapid development of the holding and management company in the public utility field has presented new problems of regulation.[1] The public service commissions or other regulating authorities have direct control over the rates, service, and in some cases the capital structures of the operating companies. Holding and management companies, on the other hand, do not make rates, nor give service to the public, but their charges for the service which they give the operating corporations in respect to management and financing or for the supply at wholesale of gas or electricity, enter into the rate. Where a management company like the American Telephone and Telegraph, owning a manufacturing company making instruments which are sold to the operating telephone companies, has a practical monopoly in such instruments, another element develops which also raises a question as to how far the power of the regulating authority should reach. Holding-management companies usually control operating companies in many states and may themselves indeed have no office or records in the states in which their work is done, thus rendering the problem even more complicated, since the regulating authority cannot control them. Owning control of the stock of the operating company the holding company is able, it is claimed, to make what arrangement it pleases for its services without any practical control by the directors of the operating companies. They are also able to build up huge capital structures based on the earnings of the operating companies and have therefore a definite object in making those earnings as large as they can possibly be and in putting an excessively heavy service charge upon them from which to get a part of their revenue to pay their interest or dividends.

In answer to the danger of oppression of the public it is said that the regulating commissions of the states control the rates and the service of the operating companies. They can thus protect the public, especially as they may examine management and financing contracts in order to see whether their terms are fair and the charge made is reasonable. They can do this not through any control over the management company, but through their control over the public utility whose board of directors they can prevent from carrying out an arrangement which they consider not in the public interest. This control over rates and service added to control over the capital structure of the operating company should be amply sufficient in the interest of the public.

The advantage of the holding company is generally admitted. The holding company can give

1. Regulation of Public Utility Holding Companies, David E. Lilienthal, 29 Columbia Law Review 404.

management service on a wide scale to a large number of operating companies with a more highly skilled organization than anyone of them could singly command and by combining purchases of supplies another advantage is gained. In the electrical field the holding company controlling a number of operating companies and electric generating plants, is able to make better arrangements for the supply of electricity than would otherwise be possible, since instead of depending upon one plant, each operating company is able to secure current from any one of a number of plants, so that the failure of one will cause no delay in service. With the great development in the shipment of natural gas and the service by long distance pipeline of gas from single fields throughout a wide territory, the same process of long distance supply of natural gas as happened in the case of electricity is evidently going on. Service in financing is also an important item. Without the aid and the stability which a large holding company gives to public utility enterprises it would probably have been impossible to achieve the development which has been going on and is continuing in this country.[2]

The problem then is faced as one of control of the holding company. At present opinions are much divided as to whether there should be a degree of direct control of the holding company or as to whether the control of rates and service of the operating company is not a sufficient check.[3] There is now but little direct regulation of the holding company.[4] The state commission, however, in fixing rates of the operating companies, may call into question the fees charged for management or other service by holding companies or the prices at which gas or electricity or other supplies are furnished, and refuse to include the item as a proper allowance on which to fix rates. Having control over the books and records of the operating companies, they can compel disclosure of the prices paid either for service or for supplies and by whom the money was received, and will thus normally discover the relation of holding and operating companies.[5] Where the control is so great that the holding company is practically an operating company, it is even possible for the commission to look through the corporate veil and to exercise direct control over the operating company.[6] The power to limit the price for services and for supplies paid the operating company, being based on the right to fix rates and service of the utilities company, the courts have in the past limited the commission's power by laying down as a test, that the question is whether the value of the services to the operating company or the price paid for supplies was fair from the point of view of the operating company, without consideration of the profit or cost of service to the holding company. The commission should not, say the courts, put itself in the place of the board of directors of the operating company and make contracts for them, but should only control their contracts to determine whether, in view of the services rendered or the supplies given, the price was reasonable.[7]

Recently there has been, however, on the part of some of the regulating commissions a tendency to consider not alone the value of the services to the utilities company, but also the cost of the services to the holding company and the profit of the holding company in determining the fairness of these contracts.[8] A recent decision of the Supreme Court appears to sanction this practice, at least where there is a very considerable degree of control on the part of the supplying or management company over the operating company. In considering the proper allowance for certain services furnished to the Illinois Telephone Company by the American Telephone and Telegraph Company as a reasonable charge against expense of the Illinois company, the Supreme Court said: "We see no reason to doubt that valuable services were rendered by the American Company, but there should be specific findings by the statutory court with regard to the cost of these services to the . . . American Company.[9] Thus the commission may take into consideration what would be a reasonable profit to the holding company, instead of basing its allowance solely on what would be a reasonable price for the operating company to pay. Thus, to a degree, a direct control over the holding company and its operations so far as they relate to its relations with the operating company is permitted to the commission. Particularly would this be the case where the holding company has practically a monopoly of the article supplied or is in such a situation that the service can be given only through it and as a consequence there is no open market but rather a monopoly market, and so no means for the commission to fix a market price of the article or services furnished.

Under the decisions of the court the state commissions are in a fair way to develop such control as is necessary through the fixing of rates, with the authority which they now have, and in 1930 it was so declared by the National Association of Railroad and Utility Commissioners.[10] Such, however, was not the opinion of the special investigation commissions which reported in 1930 to the legislatures of New York and Massachusetts.[11] In both states the legislatures were urged to extend the jurisdiction of the commission either directly or indirectly.

Indirectly the existing control over the price of services and supplies was strengthened by giving to the commissions the right to examine and approve contracts in separate proceedings and not as part of the rate-making procedure. Where the control is exercised as part of the rate-making procedure it can only affect a contract already in existence under which payments are made or sought to be made. An order by the commission to reduce payments may, of course, be contested in the courts and the payments under the contract continued under an in-

2. William E. Mosher, Electrical Utilities, p. 94; Hearings of Senate Committee on Interstate Commerce, 70th Congress 1st Session, on Senate Resolution 83, p. 255; Smith v. Illinois Bell Telephone Company, 51 Sup. Ct. Rep. 65, Dec. 8, 1930.

3. Should the Utility Holding Company Be Regulated? Public Utilities, February 19, 1931, Debate by Professor James C. Bonbright and Martin J. Insull, p. 195.

4. Law of Utility Holding Companies, David E. Lilienthal, 31 Columbia Review 194.

5. Smith v. Illinois Bell Telephone, *supra* note 2; Proceedings of the Academy of Political Science, Vol. XIV, May, 1930, p. 130; United States Fuel Gas Company v. Federal Railroad Commission, 278 U. S. 300.

6. U. S. Fuel Gas Company v. Railroad Commission; Ohio Mining Company v. Public Utility Commission, 140 N. E. 143; 31 Columbia Law Review 196.

7. Should the Utility Holding Company Be Regulated? Debate in Public Utilities, February 19, 1931, p. 205; 31 Columbia Law Review 197ss; 29 Columbia Law Review 412. Houston v. Southwestern Bell Telephone Company, 259 U. S. 318.

8. 31 Columbia Law Review 200.

9. Smith v. Illinois Bell Telephone, *supra* note 2.

10. U. S. Daily, December 1, 1930, cited in 31 Columbia Law Review 189.

11. For brief discussion See *The* Massachusetts Proposals for Public Control, Lewis Goldberg, Proceedings of the Academy of Political Science, p. 101ss.

junction against the commission during the long and slow process of the decision by the courts as to its reasonableness. Massachusetts[12] modifies this procedure by requiring that no contract for the sale of gas or electricity to a public utility company for more than two years shall be made, without the consent of the department, unless it contains a provision for a review by the department to determine the price to be thereafter paid under the contract. Any contract not containing such a provision is void. Consequently, the department under the contract has the control of the prices to be paid, either through its right to prevent the contract being entered into in the first place, or through its right to act under the clause in the contract between the operating and the supplying company.

New York added to its indirect regulation of similar contracts, together with any other expenses by a public utility company, by placing the burden of proof on a corporation or municipality operating a utility to establish the correctness of the accounts in which such outlays and receipts have been entered, and the commission may suspend a charge or credit pending submission of proof by such person, corporation, or municipality.[13] Neither act is limited to holding companies, but the new Massachusetts[14] control over service contracts applies only to contracts with the latter, termed affiliated interests. In the review, however, provided by the contract, the department may not only fix the compensation to be thereafter paid, but it may further declare the contract terminated, if the contract price is excessive, even if there is no bad faith.

New York[15] approaches the subject somewhat differently. It provides that no service or management contract made with an affiliated interest shall take effect unless it is filed with the commission, which after investigation and hearing, may disapprove the contract, if it decides that the contract is not in the public interest. Thus under these statutes the public authority is given a control over the terms of the contract itself before it takes effect, or, under the Massachusetts plan, a continuing control over the prices to be paid in a separate proceeding under the authority granted by the consent of the two parties in the contract and not in the complicated procedure of fixing a rate into which cost, under a contract already in effect, would enter. Its control over the contract would then be direct and would not be indirect through refusing to allow a rate based on the sum paid under the contract.

This special control in respect to "associated interests," renders necessary the definition of "associated interests." Here the two states differ somewhat. Massachusetts[16] makes an affiliated company include any corporation, society, trust, association, partnership or individual, which controls a public utility company, (a) directly by ownership of the majority of the voting stock or minority giving substantial control, or indirectly by ownership of such majority or minority of voting stock of another corporation or association so controlling such company, or (b) so controlled by a corporation, society, trust, association, partnership or individual, controlling such company, or (c) standing in such relationship to a utility company that there is an absence of equal bargaining power between it and such company in respect to their dealings and transactions. In New York the term "affiliated interests" includes a corporation or person owning or holding directly or indirectly 10 per cent or more of the voting capital stock of a utility corporation, and further, every corporation or person in any chain of successive ownerships of 10 per cent or more of the voting capital stock of the utility corporation, thus in the case of pyramiding following the ownership, so that a corporation at the top of the pyramid holding in some way a 10 per cent control of the stock of an operating company will be an affiliated interest whose contracts are subject to the scrutiny of the commission. The legislature, furthermore, looked on the other side of the picture, and included as an affiliated interest any corporation 10 per cent of whose stock is owned by the owner of 10 per cent of the stock of the utility corporation, so that if the same person or corporation owns 10 per cent of the stock of the utility and 10 per cent of the stock of another corporation which has itself no interest in the utility, the contracts between the two corporations will be subject to review by the commission. The same is true of corporations which have officers or directors in common with the utility company. A general clause treats as an affiliated interest every person or corporation determined by the commission to be exerting influence in conjunction with another corporation or person with whom there exists a relationship through common ownership, or through blood, by such action in concert that they are affiliated within the meaning of the law, even though not one of them alone is so affiliated.

Thus both states include corporations or persons which have substantial interests in the utility. New York, however, considers that 10 per cent of ownership is sufficient to make it necessary that the commission have this power of revision of contracts, whereas Massachusetts is less specific, taking as a criterion the fact of holding stock ownership sufficient to give control. New York expressly regulates chains of holding companies and it would appear that they would come under the broad terms of the Massachusetts statute, but New York takes a step further by expressly including as affiliated interests any corporations whose officers and directors are interlocking. Obviously under the general clauses there will be a wide possibility of review by the courts as to whether in a particular case a holding company in Massachusetts is exercising substantial control over the utility or is in such a position that there is no equal bargaining power between it and the utility, and in New York whether there is such concerted action as would give the commission jurisdiction. By chapter 760, which gives to the commission jurisdiction over these interests to the extent of having access to their accounts in respect to transactions with utilities and to require reports from the affiliated interests in respect to such transactions, New York takes a step toward direct control of affiliated interests. The investigating commission in New York emphasized the need for information of owners of stock in holding companies. The legislature attacked this point by Chapter 760 which requires disclosure of the identity of holders of voting corporate stock in public utility companies, if the holding is 1 per cent

12 Laws of 1930, Chapter 342
13. Laws of 1930, Chapters 776, 778, 779.
14. Laws of 1930, Chapter 396.
15. Laws of 1930, Chapters 760, 761.
16. Laws of 1930, Chapter 395.

or over. This information must be contained in the annual reports of the utility and the commission is, furthermore, given jurisdiction over holders of voting capital stock in a utility to compel disclosure of the identity and respective interests of every owner of 1 per cent or more of the voting stock of the utility and may compel disclosure of interests in intermediate corporations or trusts, either directly, or if the information cannot be secured directly, then by requiring information from any person or corporation who is in a position to give it.

A few Governors' messages in 1931[17] call attention to the position of the holding company and request legislative action. In Oregon Governor Meier says that holding companies and interlocking directorates are used to confuse financial operations, earnings, outlays and other phases of public utilities, and he wants the legislature to limit and regulate the power to contract between holding companies and their controlled operating companies. Governor Moody of Texas believes that there should be regulation of the situation arising from the control of power companies through holding or finance corporations; and Governor La Follette of Wisconsin calls attention to the situation arising from the rapidly increasing inter-connection and consolidation of public utilities. Recognizing the necessity for consolidation to secure proper service, he believes that the existing situation under which the management holding company escapes state control is unsatisfactory. In Iowa, Governor Turner recognizes that a new factor has come into the public utility field through the pipelines bringing gas and petroleum into the state from far distant wells. He urges that control be established through legislation providing that no franchises shall be issued without proper regulation. In Illinois, Governor Emmerson registers a widely felt apprehension over the danger of federal control encroaching on the power of the state. If this tendency continues, he fears it will "take away from state governments many of their rights over utilities within their borders."

Several bills touching the relations between utilities and holding companies have been introduced into the legislatures of 1931 and one has become law. Kansas[18] has adopted a plan similar to that of New York, but goes further. The definition of affiliated interests is that of the New York law and in addition to the review of management contracts, the law expressly provides that there shall be no consideration of the price paid for services or for any material or commodity furnished by "a holding or affiliated company," unless there is an intemized showing by the operating company of the actual cost to the company furnishing the service, material or commodity. The Sunflower State suggests a means of assuring direct control over foreign holding companies. They may not acquire the stock or control of "a local operating unit," either directly or through a trustee, without entering into an agreement to keep the public service commission informed as to transactions between it and the operating unit, and to submit to the jurisdiction of the commission in respect to such transactions.

Federal regulation is also in the air. The Federal Trade Commission is making an investigation under a Senate Resolution.[20] Many complications are involved in the interstate activities of holding companies, as the difficulty of securing jurisdiction over a holding company which has no office in a state where it may control a number of utilities to whom it gives services or sells supplies. Congressional action in such cases has been urged, but is opposed vigorously by the utilities themselves and by the state officials,[21] and Congress does not seem to be inclined to accept the jurisdiction, which might involve a very far-reaching interference in state utility regulation. In the case of the utilities the problem would differ from that involved in the division of authority between interstate and intrastate regulation of carriers. The great bulk of the telephone business is intrastate; in the gas and electric industry the retailing is done almost altogether locally. The interstate question is one of transporting and wholesaling to retailing companies; service contracts apply to work done within a state and for local operating companies. If the cost to the wholesaling or management company is to be considered in passing on the fairness of a price charged to an operating company for service or for gas or electricity or supplies, there might be a decided advantage in having the question determined once for all by a single federal commission rather than by each state commission for its own purposes, with the inherent difficulties of getting the records of non-resident holding companies, and of allocating overhead and other expenses between the operating companies in different states.[22] Neither New York nor Massachusetts has gone very far in either direct or indirect regulation of holding company relations, but they have definitely faced the problem and offer to the other states a step in its legislative solution.

17. Supplement to The United States Daily, February 16, 1931.
18. Laws of 1930, Chapter 760.
19. U. S. Daily, March 6th, 1931, p. 1.
20. Sen. Res. 83, Hearings—note 2 *supra*.
21. Op. cit.
22. Chesapeake & Potomac Telephone Co. v. Whitman, 3 F(2nd) 938.

OUR STAKE IN THE ETHER

Growing World-wide Demand for Channels Makes Necessary a Satisfactory System of International as Well as National Regulation—No Coherent Body of Law Representing Communications Policy of the United States—Unwisdom of Unrelenting Application of Anti-trust Laws to Situation*

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In a period of thirty years communication by radio with foreign countries, ships at sea, and aircraft has become a matter of daily routine. Broadcasts of events at home and abroad are a normal source of information and entertainment. Because radio is so dependable, so commonplace, we tend to forget that it is governed by physical laws that limit the number who can engage in point to point communication and broadcasting. The growing world-wide demand for "channels" exceeds the supply—a fact that explains the need, and indeed requires, a satisfactory system of international as well as national regulation. Above all, the scarcity of facilities requires legislation and administration that will insure that the channels available for assignment in the United States will be put to the greatest beneficial use.

Although radio communication is carried on through an insubstantial medium, the ether, to some extent it is subject to economic and legal considerations that apply to transportation and to communication by telephone, telegraph, and cable, as to which we have developed relatively stable and mature policies and practices of regulation. Any analysis of present conditions and any attempt to formulate a policy to control the future use of radio should involve an examination of our experience in the regulation of transportation and wire communication.

If we were concerned only with property rights, an inquiry as to the essential nature of the ether would be futile; for its availability as a medium of communication is the practical equivalent of possession, and property which is employed in the process of radio transmission or reception has the same legal attributes as property otherwise beneficially employed. To deal intelligently with the problem of regulation, however, it is necessary to define, or at least describe, the element we are attempting to administer and conserve.

It is helpful to compare the ether with material resources like the mineral reserves and the forests which are subject to ownership, exploitation, consumption, and exhaustion as determined by demand and as controlled, to some extent at least under enlightened administration, by the public interest in conservation. The ether is unlike either of these, of course, in that it cannot be reduced to possession, and hence is incapable of material waste. Nor is it like the air we breathe or the water we drink, for these substances are capable of physical waste and pollution. Under certain conditions the public lands may be appropriated for agricultural, mining, or industrial purposes. Running water may be purchased for power and other beneficial uses. The nature of the ether is such, however, that it eludes satisfactory definition. It is intangible and continuous, permeating and surrounding the universe. It is circumambient and penetrating, existing everywhere, in vacuums as well as in space occupied by matter, whether gaseous, liquid, or solid. It is simply a conception of the human mind which is useful to explain the phenomena that permit electromagnetic impulses to be propagated and received through space in such a manner as to make possible communication by signal or voice.

To appreciate the need for establishing a system of administration that will provide adequate means for selection between competing applicants for limited facilities, it is necessary to examine briefly the phenomena that render the ether accessible as a medium of communication. The electromagnetic impulses are propagated in all directions from the transmitter as waves (or particles, if one accepts the "quantum" theory) having the speed of light, about 186,000 miles a second, regardless of wave length or intensity. The length of the waves, that is, the distance from the crest of one wave to the crest of the next successive wave, depends upon the frequency with which the electro-magnetic impulses are propagated, and it is customary to specify transmission by referring either to the length of the waves in meters or to their frequency in terms of cycles per second. Hence we have long wave or low frequency and short wave or high frequency transmission. And because ether waves are like light waves (always traveling through space at the rate of about 300,000 kilometers a second) it is convenient to think of them as a portion of the light spectrum, the long or low frequency waves near one end and the short or high frequency waves extending toward the other end of the spectrum.

Some of the limitations of radio may be explained by reference to familiar electrical phenomena. The current ordinarily used for domestic lighting alternates 60 times a second. Such current is described as 60 cycle current, for the movement back and forth through the circuit is called a cycle. The current which causes radio waves suitable for practical use alternates at rates from as low as about 10,000 cycles a second to as high as about 60,000,000 cycles a second. For convenience, the

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term kilocycle is used, a kilocycle being 1,000 cycles, just as a kilometer is 1,000 meters.

These are facts of controlling importance, for the development in the art of communication is such that satisfactory reception of signals, messages, or broadcasts from more than one station attempting to use the same frequency, or wave length, is impossible. In this sense the ether may be compared to a region containing a number of parallel highways on any one of which collision is inevitable if the opposing signals, however weak, are capable of detection by the receiving apparatus. Although the danger of collision is never wholly absent under the circumstances I have stated, if stations assigned the same frequency are widely separated geographically, and if the ratio of the intensity of the desired to the undesired signal is very high, the resulting interference may not be appreciable, and under such circumstances duplication in the simultaneous use of frequencies is frequently practicable.

Interference of the type just described is called heterodyne interference and generally results from the interaction in the receiver of signals from stations attempting to use the same frequency. In the present state of the art it is usually impossible for stations to synchronize exactly and their failure to do so results in the whistles and howls with which we are familiar. Another form of interference, called cross-talk, is caused by the limitations of receiving sets, which in the present stage of development are incapable of selecting the desired signal and excluding signals on closely adjacent frequencies if the intensity of the latter are strong in proportion to that of the former.

These phenomena are especially significant in their application to frequencies above 6,000 kilocycles, for such frequencies, under certain conditions, have a world-wide service and interference range, while almost all useful frequencies have actual or potential interstate and foreign interference possibilities. This is a statement in elementary terms of the technical basis and need for international agreements relating to the use of frequencies possessing an international effect. The latest of a series of such agreements to which the United States is a party is the North American Agreement of February 1929 relating to the assignment on the North American Continent (excluding Mexico) of frequencies between 1,500 and 6,000 kilocycles. The next general international conference will be held in Madrid in 1932, at which time the representatives of the United States may be called on to show what use is being made of the large number of frequencies presumably preempted by American registration at the International Bureau of the Telegraph Union at Berne, the agency through which the parties to the Washington Convention of 1927 have agreed to exchange advice in such matters.

The frequencies reserved by treaty and regulation for use in this country and abroad for broadcasting occupy a band 950 kilocycles wide, extending from 550 to 1,500 kilocycles. Owing to the need for a separation of at least 10 kilocycles between assignments in this band, there are only 96 channels, or frequencies, available for assignment. To avoid interference between American and Canadian stations, 6 of the 96 channels have been set aside by a "gentlemen's agreement" for exclusive use by Canadian stations, and 11 may be used in both Canada and the United States, with severe limitations on the amount of power used by any such station. No provision has been made for Mexico, and recent developments indicate that the United States will be forced to relinquish a number of its 90 channels for use in that country. In Europe certain additional frequencies below 550 kilocycles are used for broadcasting. A movement to make the same or equivalent low frequencies available in this country for broadcasting has not gathered appreciable strength, chiefly because of the requirements of other services and the fact that commercial receivers, of which there are more than 12,000,000 in use in the United States, have been standardized for reception of transmissions on frequencies between 550 and 1,500 kilocycles.

In 1926, when regulation under the Secretary of Commerce broke down, broadcasting was reduced to a condition closely approaching chaos. The number of stations increased enormously, and several stations jumped to frequencies already used by other stations in the United States or reserved for use in Canada. To some extent conditions have been improved by action of the commission created by the Radio Act of 1927; but, contrary to the intention of Congress and against the interest of improved service, which we had reason to expect, the commission has endeavored, by various devices, to accommodate some 620 broadcast stations on the available channels. In following this course the commission has assumed that a great deal of waste is a necessary condition, for it is impossible, by division of time, limitation of power, geographical separation, or any other means, to eliminate interference between so many stations. Strange as it may seem, if there were only 90 full time, non-interfering, high power stations, we should receive more satisfactory, dependable service than we do at present from 620 stations.

The need for adequate regulation of stations using the high frequency and broadcast bands has been indicated. There are international as well as domestic reasons for developing a communications policy which will insure the greatest beneficial, non-interfering use of the limited facilities available to the United States. To some extent the number of available frequencies is being increased by improvements in the art which permit closer assignments. For example. toward the high frequency end of the spectrum, above 1,500 kilocycles, improved methods have increased the number of useful channels from about 1,260 to about 2,500. In the low frequency range, below 550 kilocycles, there are about 700 available assignments. But the world-wide demand for frequencies is so great that regardless of advances in the art they must be administered with the utmost care if the interests of the public are to be sufficiently safeguarded. The applications from agencies engaged in transoceanic, domestic, and marine communication on a public service basis, from agencies seeking assignments for broadcast, aircraft, experimental, geophysical, amateur, television, and other purposes call for the assignment of a number of frequencies greatly in excess of the number available.

III

Throughout the civilized world the transmission of written or printed communications is a function of the state. In most of the countries of Europe the governments also provide and operate

the facilities for communication by telephone, telegraph, and cable. In a number of countries communication by radio, both telegraph and telephone, is likewise carried on as a governmental activity, and the cost of broadcasting is defrayed by a tax on receiving sets. In this country governmental participation with respect to communication is limited to the mails, excepting, of course, the radio stations which are operated for strictly governmental or military purposes and the cable between the United States and Alaska and a number of radio stations in Alaska which are conducted on a public service basis.

Our communications resources, like our resources in oil, timber, and water power, have been surrendered, perhaps wisely under the circumstances, to private interests. Yet the government has reserved a degree of control, and in the sense that all the assets of the state may be appropriated for serious governmental purposes, the facilities of communication may, if necessary in the public interest, be reclaimed or taken.

Just as services supplied locally by private interests, such as water, electricity, gas, telephone, and transportation, are controlled by a system of licenses or franchises requiring responsibility to local public administrative agencies, so the public service companies engaged in furnishing transportation, telephone, telegraph, cable, and radio service on an interstate or foreign scale are controlled by Congress through its administrative agencies. The jurisdiction of the Interstate Commerce Commission over the railroads was extended by act of June 18, 1910, to include the telephones, telegraphs, cables, and radio if operated on a point to point public service basis. The first comprehensive statute dealing with radio was enacted in 1912, and although it was intended primarily to control radio telegraphy it was broad enough in terms to include broadcasting and other services which developed later. Under this act the Secretary of Commerce was made the licensing authority. By 1927, however, radio, and especially broadcasting, had reached a stage of development beyond the Secretary's control under the existing legislation, and in that year his licensing and regulatory power, as enlarged, was transferred to a new agency, the Federal Radio Commission. The Radio Division of the Department of Commerce was continued for certain administrative purposes, as it was first planned that the commission should become merely an appellate body after its first year. But the administrative life of the commission was continued from year to year, and by act of December 18, 1929, it was given an administrative tenure of indefinite length.

By February 1887, when Congress first took action with respect to the railroads, the transportation structure of the country was fairly well crystallized. This explains in part why features of the competitive system were retained. Another explanation may be found in the fact that the first railroad legislation was enacted during the period of a reaction against big business which resulted in the Sherman Anti-trust Act of 1890. Since that time the public has learned that the public interest is not always promoted by strict adherence to the competitive system, and the present plan of control is based on highly regulated competition between a few large systems of carriers, each to a substantial extent serving exclusively large sections of the country.

Between the two telegraph systems there is substantial competition, subject to regulation by the Interstate Commerce Commission as to service and rates, although the business of Postal is only about 16 per cent. of the total and in many places Western Union does all the business. Between the cable companies, domestic and foreign, there is very keen competition for American traffic. In addition to the restrictions otherwise imposed on American cable companies, all companies landing or operating cables connecting the United States and any foreign country must obtain revocable licenses from the President, under the Kellogg Act, in which it is specified that the rates and service must be reasonable. As between Western Union and Commercial (Postal), the former does about 60 per cent. and the latter about 40 per cent. of the cable business.

With respect to the telephones, however, the anti-trust laws have been specifically suspended and the remarkably efficient and complete American telephone system has grown into a regulated monopoly under a provision which permits the merger of competing telephone companies engaged in interstate or foreign commerce upon a finding by the Interstate Commerce Commission that a proposed consolidation, acquisition, or control would be in the public interest.

In one sense the Radio Act of 1927 is based upon state and federal experience in the regulation of utilities, for it provides that licenses will be issued only if proposed operations will promote the public interest. While the commission has ample authority to license and regulate actual operations, in other respects it is meagrely endowed. Unlike the Interstate Commerce Commission, it cannot act on behalf of the public to obtain intimate knowledge of and to supervise the features of operation that affect the quality of service and the rates. It has no authority to allow consolidations that would serve the public interest if such consolidations would be unlawful under the anti-trust laws. With respect to the regulation of point to point commercial service it divides authority with the Interstate Commerce Commission, and with respect to certain administrative functions it shares its powers with the Radio Division of the Department of Commerce.

IV

There is no coherent, comprehensive body of law which one can refer to as representing the communications policy of the United States. If a well-considered and consistent program is necessary to the social, military, and economic welfare of a modern state, this country is backward and neglectful. In establishing a machinery and technique to promote and control communication we have not exhibited the same mastery and resourcefulness that have been a feature of our scientific progress.

But there is evidence of dissatisfaction with present conditions. During the 71st Congress the Senate Committee on Interstate Commerce heard testimony to the extent of about 2,500 pages relating to various features of a proposal to establish a federal commission on communications—an indication of active interest in the subject and a recognition of its national importance. To attain unity and consistency of control, the Senate bill proposed that the Interstate Commerce Commission be relieved of

its authority over telephone, telegraph, cable, and point to point radio communication and that its power to control rates and service be given to the new commission on communications. The proposed commission would also exercise the licensing and regulatory authority of the present radio commission. Moreover, a serious attempt was made to persuade the Senate committee that it should report out a bill that did not carry over the provision in the present radio act forbidding merger of the communication facilities of the Radio Corporation of America and the International Telephone and Telegraph Corporation, and that the proposed merger of these facilities should be specifically exempted from the operation of the anti-trust laws.

Apart from the primary problem of framing a satisfactory policy for the development and control of communications conducted on a public service basis, it is evident that there is widespread discussion of broadcasting as carried on as private enterprise in this country. It is said that the number of receiving sets in operation in the United States exceeds 12,000,000, and in a brief recently filed in the Supreme Court counsel for the National Association of Broadcasters, an organization representing 136 out of about 620 broadcasting stations, have asserted that "the United States is immeasurably in advance of the rest of the world in per capita ownership and use of radio receiving sets, and broadcasting is a far more effective and more popular means of mass communication than elsewhere." One may praise many of the performances created and distributed by the National Broadcasting Company, the Columbia Broadcasting System, and originated by some of the chain and a few of the unaffiliated stations, and at the same time deprecate legislative policy and administrative weakness that permit the use of the ether under federal franchise for self-advertising stunts, for the sale of quack medicines, for the exposition of religious or social creeds in which the public generally has no interest, and for numerous other purposes which do not conform with any reasonable standard of public service.

V

I have shown that the public policy of the United States does not invariably follow the competitive principle and that, with respect to public service agencies at least, the most economical and satisfactory results are frequently obtained under a system of strictly regulated monopoly. Railroad consolidations are proceeding in that direction as nearly as circumstances permit. It is a system under which local utilities, such as telephone, water, gas, electricity, and tramway companies, have long been operated. In the case of the American Telephone and Telegraph Company regulated monopoly is synonymous with good service at reasonable cost. That uncompromising adherence to the competitive principle is invariably beneficial is disproved by our experience in certain industrial fields, and there is a movement on foot for legislation which would suspend the application of the anti-trust laws whenever it is established that a proposed consolidation, acquisition, or arrangement would promote the public interest. The antitrust laws have already been rendered specifically inapplicable to certain non-competitive arrangements for export trade, for shipping, and for the marketing of agricultural products.

For the present, however, it is doubtful if Congress will modify existing legislation so as to permit complete unification and coordination of all communication facilities. There is much to be said for a system under which telephone, telegraph, cable, and radio would be consolidated under the control of a single administrative agency given adequate powers to supervise all the elements of operation that affect the schedule of rates and the quality of service. Control of this type would provide the United States with the practical equivalent of the British merger, under which the communication facilities of the Empire, private and public, wire and radio, have been placed under central official control connected with the post office.

There are two factors which partially explain the hesitation of Congress to follow the enlightened, ideal course: First, the present radio commission got off to a bad start through the insufficiency of the funds provided to carry on its work and through the death and resignation of a number of its members. These circumstances, combined with widespread dissatisfaction with certain of its policies and practices, have kept the commission from gaining the confidence of Congress. Second, because of suspicion growing out of the fact that the Radio Corporation of America holds a dominant position with respect to patents and manufacturing, Congress has been unwilling to suspend the anti-trust laws so as to permit the corporation, the largest factor in the radio communication industry, to take the next step in its development. Congress has thus far been unconvinced by the claims of the corporation that it was brought into being under the aegis of the Wilson administration to save important inventions from passing into British hands and that widely distributed and conflicting patent claims would have stunted the growth of the art if the corporation had not obtained control of sufficient patents to enable it and its licensees to manufacture modern apparatus.

While these circumstances explain in part the attitude of Congress, they do not justify any further delay in meeting the question, how can our severely limited radio communication resources be most effectively conserved? If total unification is Utopian, what immediate steps can be taken to enable American radio interests to present a united front in dealing with foreign governments and monopolies?

A concrete proposal to unify the communication facilities of the Radio Corporation of America and the International Telephone and Telegraph Corporation in the hands of the latter, subject to Congressional approval and control, has been presented. On March 1st the Radio Corporation advertised direct service from New York or San Francisco to 37 countries. Its marine facilities are extensive and unexcelled. In the United States, however, it has one circuit between New York and San Francisco, and, except for offices at Boston and Washington connected by wire with the central office in New York, it has no pick-up and delivery facilities of its own. The world-wide interests of the International Corporation include the Postal Telegraph and Commercial Cable Systems, All American Cables, and Mackay Radio and Telegraph Company, enterprises that could provide the extensive domestic pick-up and delivery facilities needed for a greater beneficial use of the Radio Corporation's marine and transoceanic circuits. The

projected merger of the land line, cable, and radio telegraph facilities would give the public all of the advantages of co-ordinated service, and at the same time, if there is fear of monopoly, would preserve and intensify competition betwen communications companies. For if the limited merger is approved, the International Corporation would still face active competition from the telegraph and cable system of Western Union and the telephone (including trans-oceanic and marine radio telephone) service of the American Telephone and Telegraph Company, not to mention the air mail.

Although Western Union has expressed the desire and shown the ability to continue to compete on the present basis, if Congress should go a step further and permit consolidation of all record communication companies, including Western Union, there is still some assurance to the public that the competitive principle would operate to prevent abuse. For the American Telephone and Telegraph Company is already engaged in the leased wire telegraph business on a large scale, and it is probable that the company will lay a trans-Atlantic cable of enormous telegraph and telephone capacity. Assuming Congress is unable to maintain rates and service on a reasonable basis, the ability of the Telephone Company to engage in the telegraph and cable business on an extensive scale is a check against any possible abuse.

The desirability of authorizing a completely unified, non-competitive communication system, of superseding the Interstate Commerce Commission and the Federal Radio Commission by a single agency controlling all forms of wire and radio communication, may be open to debate. But there seems to be no good reason for continuing to forbid arrangements between radio companies, or between radio and telegraph or cable companies, which would result in improved service to the public, in economies of capital outlay and operating cost, and in making available a larger fund under single direction for the study and solution of the problems and the intensive development of the communications art. Speaking from his experience as head of the government's coordinated communications system in and to Alaska, on May 18, 1929, Major General George S. Gibbs made the following statement to the Senate Committee on Interstate Commerce:

"... My view of it is that what we ought to have is not radio companies and wire companies and telephone companies, or cable companies, but communication companies, and I think we are all going to live long enough to see that come about. That is inevitable."

* * *

"If a communications company such as I visualize and tried to describe has at its command or available to it any possible means of communication, it has a flexibility and an ability to serve the people that it could not possibly have if it is denied certain other forms of communication. That is what I mean."

The proposal above referred to for consolidation of the communication interests of the Radio Corporation of America and the International Telephone and Telegraph Corporation took the form of a conditional accord made public March 30th, 1929. Consummation of the arrangement presupposed enabling legislation which the 71st Congress failed to provide, and the accord has been dissolved. In the following public announcement jointly issued March 6th, 1931, by the two companies, there is, however, an expression of sufficient faith in the soundness of the proposal to justify a reasonable hope that the consolidation can be effected when the American people are sufficiently aroused to demand the legislation which is needed to conserve their priceless interests in the ether:

"The accord made public by the two companies on March 30, 1929, for the consolidation of their respective communication interests when the law permitted, has been dissolved. This decision was necessitated by the fact that despite the increasing influence of communication mergers in foreign countries and the obvious advantage to American communications interests from consolidation of their services, no legislative action has been taken to eliminate these handicaps or to facilitate the consolidation. The managements of the two companies have, however, in no way altered their sincere conviction, announced in their public statement of March 30, 1929, that the unification of American record communication services would be to the interest of our country and people."

I have stressed the proposed merger of the communication facilities of the Radio and International Corporations only because I believe that unrelenting application of the anti-trust laws in this situation may deprive the public of the benefits—economy, flexibility, and dependability—that would accrue from coordination. In the interest of greater conservation of frequencies and economy and reliability of operation I should recommend laws that would permit any feasible consolidation of radio facilities now assigned to shipping companies, the press, aviation interests, and oil companies—all on a public service basis, subject to strict control by a single governmental agency.

VI

It is typical of the American genius that it has used the apparent weakness of radio, its lack of secrecy, as the foundation for the billion dollar industry that has developed as a result of broadcasting. Radio's unexpected, unprecedented usefulness as a carrier of information and entertainment is still a cause of wonder and confusion. Many seemingly settled institutions of life have come within its influence. Education, the press, the church, the theatre, and to some extent business and home life have felt its transforming touch.

In a period of ten years broadcasting has appeared and developed beyond a stage of convenient control. Is it any wonder that our attempts to deal with it have led to confusion and disappointment! We became gradually familiar with radio as a means of point to point communication. In this relation it suggested valid analogies, and the economic and legal machinery was adjusted to handle it according to established principles. For radio as a means of mass communication, however, there was no reasonably comparable or helpful precedent.

These circumstances make it possible, and indeed necessary, for Congress to deal separately with the problems of broadcasting. There is no immediate need for radical revision of the present broadcast structure, and legislation representing a more or less final disposition of broadcast problems should be preceded by a period of careful investigation of conditions in this country and abroad.

BAR EXAMINERS AND EXAMINEES

Importance of Boards of Bar Examiners as an Element in Legal Education—Some Results of Questionnaire Recently Sent to Them—Value of a Permanent Organization—Conference to Be Held During Next Meeting of Association

By Will Shafroth
Advisor to the Council of Legal Education of the American Bar Association

THE importance of the bar examiners as an element in legal education has not been sufficiently emphasized. There are three groups in the profession which are primarily concerned with the problem of what the law student is going to do when he starts practicing law. The first of these is the practicing lawyers themselves. They are interested as a guild in seeing that the newcomers to their profession are adequately qualified both intellectually and morally to uphold their standards and traditions. The second group, the law schools, are interested in turning out the best possible product for that is their business. The bar examiners as an agency of the state represent the interest both of the practicing lawyers and of the public. It is their duty not only to see that those candidates who are admitted measure up to the general standards of the bar, but also that they meet the independent standard of what the public has a right to expect of a lawyer.

In a way the bar examiners are a connecting link between the profession and the law schools, because they test the training which has been given in the law schools and apply to it the measure of that practical knowledge which is required in the profession. It is through their agency that the law schools are brought to a keener realization that their products must have more than a theoretical knowledge of law. On the other hand, they are in close enough contact with the law schools to realize that the most important things those schools do is to give their students a sound knowledge of fundamental legal principles and develop in them the faculty of logical reasoning, and it therefore becomes the bar examiners' duty to impress on the profession the fact that law school graduates are not expected to know all the statutory law of the state or to be experts in practice and procedure.

"A questionnaire was sent out some time ago to the board of bar examiners of each state, and a summary of the results follows: Number taking bar examinations year ending July 1st, 1928, 17,288; 1929, 18,305; 1930, 19,830. Number passing during year ending July 1st, 1928, 9,276; 1929, 9,387; 1930, 9,445. Admitted by diploma without examination—1928, 617; 1929, 630; 1930, 567. Total passing examinations and admitted on diploma—1927-28, 9,893; 1928-29, 10,017; 1929-30, 10,012. One interesting fact which immediately appears is that although the number of candidates has increased every year for the last three years the percentage who pass has become smaller, with the result that the number actually admitted has been almost stationary, at 10,000. This figure taken in connection with the conservative Martindale count of the number of lawyers (147,000), is quite significant. Dean James G. Rogers, of the University of Colorado Law School, in a recent article in the New York State Bar Association Bulletin, estimates the practicing life of the average lawyer at 35 years. Dividing this into the number of lawyers he calculates we need replacements to keep our present numbers intact of about 4,500 per year. We are actually getting 9,500. How many of these go into practice and how many into other lines of endeavor we have no figures to indicate.

It is important that bar examiners should know the facts in reference to the numbers being admitted to the bar, not only in their own state, but also in the entire country. They should also know the ratio between the number of lawyers and the number of the general population and what the trend is over a period of years. The reason for this is not that they should arbitrarily regulate the number of candidates they pass by the general situation in their state or in the nation, but it is because they are the agency closest to the situation and on which the bar in general has a right to depend for accurate information.

The number of lawyers shown by the census of 1920 was 122,519, or one to every 862 individuals. A count of the names listed in Martindale's legal directory in 1926 showed 126,835. This is undoubtedly a conservative estimate. The Martindale count of the 1930 directory showed 146,953 lawyers, or an increase of 20,000 in four years. It is probable that the census figures to be released this spring will be considerably above that number. Using that figure the population per lawyer is now 837, or one lawyer to every 167 families.

The mechanics of examinations in other states will be interesting to examiners. The compilation shows that in 38 states only written examinations are given, while in the 10 others some oral examination is also included, under varying conditions. The highest number of subjects given is thirty-one and the lowest number is six, while in a number of states examination is not given by subjects. The total time varies from six hours in Massachusetts to fifty-seven and one-half hours in Texas, and the passing grade from 55 to 75.

The number on the board of bar examiners varies from three to ten, the average being five. As a general rule they are appointed by the Supreme Court, although in some cases they are appointed by the Governor, and in states where there is an

incorporated bar generally the appointment is made either through its agency or on its recommendation. The length of term of examiners varies from one year to seven, the average being 3.8 years. Only in a handful of states is there a compensation in excess of $200 per annum and expenses while attending meetings of the board or examinations.

An interesting problem which was not touched on in the questionnaire relates to the number and time of bar examinations. In most states there are two examinations, one in the spring or summer and one in the late fall or winter. Some states, however, including New York and Illinois, give three examinations per year. The number of candidates of course has a large influence in this matter.

In twenty-six states the same board makes the character examination. It appears from the answers to the questionnaire that in Georgia, Louisiana, Mississippi, Montana, North Carolina, Oregon and Virginia, mere certificates, sometimes by two attorneys and one layman, sometimes by Judge of the local county court and two lawyers, and sometimes by less than these, are sufficient. In Michigan the college recommendation as certified to is accepted and in Minnesota letters and affidavits are asked for and an investigation is only made where indicated. In a number of other states separate committees pass on character, sometimes by one separate board and sometimes by separate committees in each county. In Pennsylvania not only do the local county boards investigate and report to the state board, but a statement by the candidate's preceptor, who has known him during the course of his law study, is also filed.

It is readily seen from this summary that the operation of these boards of bar examiners is far from uniform. Some states are much more advanced in some particulars than others, while they have comparatively neglected some other detail. By a closer contact between bar examiners the best features in each system will become known and the standard of bar examinations over the country will be improved.

Moreover, the help and advice of this group in problems of legal education and admissions to the bar which can be made available through an organization of Bar Examiners is extremely desirable. As shown from the questionnaire most of the examiners serve with little or no financial reward for their labors. The sacrifice of time and energy made by these men is all too little realized and appreciated. It is a real tribute to the character of our bar that the examiners are almost universally men of sterling character and high attainments, and that the thought of compensation plays no part in their willingness to undertake this important public service. Their experience enables them to bring light to many of the problems which the field of legal education holds today.

These are some of the reasons why a permanent organization of bar examiners seems important. Those examiners who met informally at the time of the American Bar Association meeting in Chicago last August were impressed with this fact, and passed a resolution requesting the chairman of the Section of Legal Education and Admissions to the Bar to appoint a committee to arrange for a Conference at the time of the 1931 meeting of the American Bar Association. This committee has been appointed and is composed as follows: Chairman, Philip J. Wickser, Secretary of the New York Board of Law Examiners, Vice-Chairman of the Conference of Bar Association Delegates, member of the Committee of the American Bar Association on Co-ordination of the Bar; Walter C. Douglas, Jr., Secretary of the Pennsylvania Board of Bar Examiners, member of the Council of the American Bar Association on Legal Education; Stuart B. Campbell, member of the Virginia Board of Bar Examiners; Charles P. Megan, member of the Illinois Board of Bar Examiners; and William E. Hutton, member of the Bar Committee of the Colorado Board of Examiners. The committee urges that plans should be made as early as possible for at least one member of each board to be present at the Atlantic City meeting. Details in regard to that Conference will be announced later.

The success of the Conference as a permanent institution will be indicated in large measure by the interest which is shown in the first meeting. A permanent Conference of Bar Examiners should become one of the important meetings held in connection with the annual gathering of the American Bar Association.

. . . .

Comments and suggestions both on the above article and on any subjects which are considered of sufficient importance to deserve discussion at the Conference of Bar Examiners will be welcomed by the above mentioned Committee, and may be sent to Will Shafroth, Adviser to the Council of the American Bar Association on Legal Education and Admissions to the Bar, 730 Equitable Building, Denver, Colorado.

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ARRANGEMENTS FOR FIFTY-FOURTH ANNUAL MEETING

To Be Held at Atlantic City, N. J., on Thursday, Friday and Saturday, September 17, 18 and 19, 1931

HEADQUARTERS: Atlantic City Municipal Auditorium. This auditorium is the finest building of its kind in the United States. It will be used for general headquarters purposes, including registration, meetings of Sections and Committees, and for the general sessions of the Association.

Section meetings will be held on Tuesday and Wednesday, September 15 and 16. Further announcement will be made in a later issue of the JOURNAL.

Because of the excellent facilities afforded by the auditorium, headquarters will not be maintained at any hotel. Arrangements have been made with the Atlantic City hotels to provide adequate accommodations for the members of the Association who will attend the meeting. Reservations in hotels listed will be made as usual through the Association's office. Requests should be addressed to the Executive Secretary, 1140 North Dearborn street, Chicago, Illinois. The following accommodations are available:

BOARDWALK HOTELS		RATES BY THE DAY Rooms with Private Bath For 1 Person		For 2 Persons	
Chalfonte-Haddon Hall	A	$ 9.00 to	$12.00	$16.00 to	$22.00
	E	4.00 to	8.00	7.00 to	10.00
Ambassador	E	5.00 to	10.00	8.00 to	12.00
Traymore	A	10.00 to	20.00	16.00 to	26.00
	E	6.00 to	16.00	8.00 to	18.00
Marlborough-Blenheim	A	10.00 to	14.00	16.00 to	28.00
	E	6.00 to	10.00	8.00 to	20.00
Dennis	A	...	...	14.00 to	18.00
President	A	7.00	...	12.00	...
	E	4.00	...	6.00	...
Ritz-Carlton	E	5.00 to	8.00	7.00 to	16.00
Shelburne	E	5.00 to	7.00	8.00 to	12.00
Brighton	A	8.00 to	12.00	16.00 to	24.00
	E	5.00 to	9.00	10.00 to	18.00
Knickerbocker	A	8.00 to	12.00	12.00 to	18.00
	E	4.00 to	8.00	6.00 to	10.00
Chelsea	A	8.00 to	11.00	16.00 to	20.00
	E	5.00 to	7.00	8.00 to	12.00
New Belmont	E	4.00 to	7.00	5.00 to	8.00
Apollo	E	3.50 to	5.00	6.50 to	10.00

AVENUE HOTELS		RATES BY THE DAY Rooms with Private Bath For 1 Person		For 2 Persons	
Morton	A	$ 7.00 to	$ 9.00	$12.00 to	$15.00
Colton Manor	A	...	...	12.00 to	15.00
	E	...	...	6.00 to	9.00
Madison	A	8.00	...	15.00 to	16.00
	E	5.00	...	9.00 to	10.00
Ludy	A	6.00 to	10.00	9.00 to	16.00
	E	4.00 to	7.00	5.00 to	9.00
Galen Hall	A	7.00 to	9.00	12.00 to	16.00
Craig Hall	A	7.50 to	9.00	11.50 to	13.00
	E	3.50 to	4.50	4.50 to	5.50
Jefferson	A	6.00 to	8.00	12.00 to	14.00
	E	3.50 to	5.00	7.00 to	9.00
Raleigh	A	6.00 to	7.00	12.00 to	14.00
	E	3.50 to	4.00	5.00 to	6.00
Flanders	A	6.00 to	7.00	10.00 to	12.00
Wiltshire	A	6.50 to	7.50	11.00 to	14.00
	E	4.00 to	5.50	5.00 to	7.00
Plaza	A	5.00 to	6.00	10.00 to	11.00
	E	3.00 to	4.00	5.00 to	6.00
Stanton	A	...	...	10.00 to	12.00
Penn-Atlantic	E	3.50 to	4.00	6.00 to	7.00
Elberon	E	4.00 to	6.00	6.00 to	9.00
Kentucky	E	2.50 to	3.00	4.50 to	5.50
Glaslyn-Chatham	A	6.00	...	12.00	...
Arlington	A	6.00 to	8.00	10.00 to	12.00
	E	4.00 to	6.00	6.00 to	8.00
Monticello	A	6.00 to	7.00	11.00 to	12.00
	E	3.50 to	4.00	5.00 to	6.00
Lafayette	A	7.00 to	8.00	12.00 to	14.00
	E	3.50 to	4.00	6.00 to	7.00
Thurber	E	...	2.50	3.00 to	5.00
Franklin	E	3.00 to	3.50	6.00 to	7.00
Grossman's	A	9.00 to	11.00	16.00 to	18.00
Sterling	A	6.00 to	8.00	12.00 to	14.00
	E	3.50 to	6.00	5.00 to	8.00
New Richmond	E	3.50 to	4.00	5.00 to	6.00
Devonshire	A	6.00 to	7.00	11.00 to	12.00
	E	3.50 to	4.00	5.00 to	6.00
Eastbourne	A	...	...	12.00 to	14.00
	E	4.00	...	6.00 to	7.00
Clarendon	A	6.00 to	7.00	11.00 to	12.00
	E	3.50 to	5.00	6.00 to	7.00
Gerstel's Lelande	A	6.50 to	7.00	13.00 to	14.00
	E	3.00 to	5.00	5.00 to	7.00
Cheltenham-Revere	A	6.00	...	12.00	...
	E	2.50	...	5.00	...
Carolina Crest (Continental Plan)		4.00 to	5.00	8.00 to	10.00
Continental	E	4.00 to	6.00	7.00 to	8.00
Maples	E	...	...	5.00 to	6.00
Grand Atlantic	A	5.50 to	6.50	11.00 to	12.00
	E	3.00 to	4.00	6.00 to	7.00
Trexler	A	5.00	...	9.00 to	10.00
	E	3.00	...	4.00 to	5.00
Delaware City	E	3.00 to	4.00	4.00 to	5.00
Louvan	E	...	...	7.00	...

NOTE: In the list of hotels A stands for the American Plan (with meals), E for the European Plan (without meals).

In addition to the above hotel rooms, all with bath, there are available rooms without bath, which rooms will be reserved on request. Rates are, of course, somewhat lower on rooms without bath.

To avoid unnecessary correspondence, members are urgently requested to be specific in making requests for reservations, stating hotel desired, number of rooms required, names of persons who will occupy the same, rate, whether European or American plan, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible.

National Conference of Commissioners on Uniform State Laws, to Be Held at Hotel Haddon Hall, September 8-14, 1931

The Conference will be held in Atlantic City, September 8-14, 1931. The sessions will be held at Haddon Hall, where headquarters will be maintained beginning Tuesday, September 8th. Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

"How to Judge a House"

"HOW to Judge a House," a pamphlet of eighty-four pages issued by the U. S. Department of Commerce, is not a discussion of a particular aspect of the judicial function, as some might hastily infer from the name. However, it is of interest to lawyers along with several millions of other Americans, and it should be of particular interest to those who have to do with real estate matters. The pamphlet is a report of a Sub-Committee of the National Committee on Wood Utilization, which was organized by Hon. Herbert Hoover when Secretary of Commerce, and of which the present Secretary of Commerce, Hon. R. P. Lamont, is chairman.

The report is directed particularly to the prospective home buyer and it gives him a mass of detailed information, prepared by experts, but written in a popular style, which he could probably secure from no other source. As the Department's announcement of the publication says, it outlines "the more important considerations in regard to structural features of the average house and its planning and design. The book has been prepared under the guidance of a sub-committee whose chairman is N. Max Dunning, of Chicago, Fellow of the American Institute of Architects. Its membership is made up of the leading architects', builders', contractors', real estate operators', and consumers' organizations in the country, and represents authoritative and up-to-the-minute information on home building and home owning problems.

"The new book is written in light, readable style, and the prospective home buyer is taken on a tour of inspection throughout the house—from basement to attic. Every important feature of construction and design is treated in pointing out in each instance how to judge the workmanship and materials. A special feature of the book is the fact that it sets forth short cuts to economy without sacrificing good construction and design.

"'How to Judge a House' is printed by the Government Printing Office, and may be obtained from the Superintendent of Documents, Washington, D. C., or from the offices of the Bureau of Foreign and Domestic Commerce located in the principal cities of the United States. The book sells for 10c a single copy, $7.00 a hundred, and $50.00 a thousand copies."

The announcement is signed by Axel H. Oxholm, Director of the National Committee on Wood Utilization.

Binder for Journal

The JOURNAL is prepared to furnish a Binder to those who wish to preserve current or back numbers, at a price of $1.50, postage paid. This represents merely the manufacturer's cost plus expense of packing, shipping, carriage, etc. The Binder presents a handsome appearance and is well made and serviceable. Please send check with order to the JOURNAL office, 1140 N. Dearborn St., Chicago.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR,
MANAGING EDITOR

Journal Office: 1140 N. Dearborn Street
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ORGANIZING THE AMERICAN BAR

Matters of organization are occupying the attention of the lawyers of the country as never before. The last ten years have been a period of unusual activity. Many State Bar Associations have checked up on their organizations and changed them with the view of making them more effective and more fully representative of the Bar. Many local Bar Associations have doubtless also adjusted their internal arrangements to new conditions. And a number of new organizations of various kinds have been launched. One may say that the idea of a better organization of the legal profession is in the air—not organization for its own sake but because it is recognized that without it the new found energy and enthusiasm of the Bar will prove a mere useless ferment.

It would be strange indeed if the national organization of the Bar, with its membership extending to every state and territory, should remain unaffected by this florescence of ideas and ideals. It has not, as a matter of course. The need of a better organization of the American Bar Association on national lines—using of course the demonstrated vitality and worth of the American Bar Association and the State Bar Associations as a basis—has been discussed for many years. Though nothing tangible may have come of it, yet this long period of consideration has not been without its advantages. It has made increasingly clear the main needs of the American Bar as a whole and it has gone far to create a general disposition to take steps to meet them. It has also left the State and local Bar Associations time in which to deal with their own immediate problems before joining in the effort to meet the need for a wider and more representative national organization.

That interest in the subject is not altogether of recent date is shown by the article in this issue in which Dean John H. Wigmore gives the substance of a minority committee report made about sixteen years ago. When Elihu Root's advice was asked as to the plan therein proposed, he expressed his agreement with the general aims but said he thought it was too early to consider the concrete constitutional changes therein recommended. The general aims certainly remain the same as they were then: first, a closer affiliation between the American Bar Association and the State Bar Associations, thus making the former a more representative body; second, greater efficiency in the procedure at the annual meeting; third, better means of securing the effective cooperation of legislatures and public with the Association's program of action. The concrete measures which will secure these desirable results yet remain to be devised.

The first of the enumerated objectives is that on which the Committee on Coordination of the Bar is working at present; and there is good reason to believe that if this can be attained, the difficulties presented by the other objectives will be more easily surmounted. A united Bar will, by reason of its very unity, have more influence, and a united Bar, by reason of its very size and responsibility, will be compelled to adopt more effective modes of procedure.

As to the first of said objectives, the Committee on Coordination of the Bar has been at work endeavoring to sound the sentiment of the Bar of the several states on the subject of a closer affiliation and also to secure practical suggestions looking to that desirable end. But it has also looked over the present organization of the American Bar Association—and very wisely in our opinion—to find what parts of its present structure may be utilized, with necessary adaptations, to promote the object in view. It has fixed upon the General Council as the most representative of the organs of the Association and made certain tentative sug-

gestions for a wider basis for the election of its members, increasing the number of its meetings, and in general giving it a greater share in the work of the Association. It also suggests the ease with which the General Council, by an increase in its membership, could be changed into a separate legislative body, in case it should be ultimately thought best to follow in that respect the model of the American Medical Association.

The tentative proposal as to the General Council is certainly worth serious consideration. In the first place, it affords an opportunity for the Association to put into effect within its existing organization those representative principles which are generally accepted as sound. The Council is the most representative of the Association's organs today, but it can be made more representative still by giving the entire membership of the American Bar Association in each State a voice in their selection. And it can be made more useful still by giving it a larger share in the deliberations and decisions of the Association. It has demonstrated its vitality by the character of the men who have regarded service on it as an honor, but particularly by the fairly recent movement within that body to find ways and means of rendering greater service to the profession. Of all the waste of which an organization can be guilty, the waste entailed by failing to utilize to the utmost the ability, character, willingness and disinterestedness of an official group is perhaps the most inexcusable.

To seize the opportunity for wise action that lies nearest is the best way to prepare for the successful execution of wider plans.

COLLECTING THE EXPERIENCE OF YOUNG LAWYERS

The questionnaire of the Association of the Bar of the City of New York, sent to the eight thousand and more lawyers who have been admitted to practice in that city since 1925, deals with an interesting but statistically unreported field. The Association is seeking to learn the income which these late additions to the Bar are earning, their general experience since admission, and whether they intend to continue in the practice. The questionnaire was sent out by the Law Department of Columbia University, which is acting for the Association in this piece of research work.

The information thus secured ought to furnish the answer to many questions which the prospective law student and his adult advisers are accustomed to ask. If it appears that, on an average, the earnings after five or more years of effort do not measure up to the rosy expectations of most young men who are contemplating study for the Bar, it is a good thing for them to know the facts when making the first momentous decision. If the figures show that a goodly percentage fall by the wayside during the first lap of the race, some of those who have some alternative pursuit in mind may be more inclined to take their chances in another field. If the report of professional experience during this period shows not only a small proportion of "beer and skittles" but also a good deal of really "hard sledding" for most of them, the less stout-hearted among the prospective students may profit by the warning.

It is generally admitted that the profession is over-crowded, and the statistics available indicate that conditions in this respect are likely to grow worse, unless some remedy is found. In a brochure issued in March by Mr. Will Shafroth, Advisor to the American Bar Association's Council on Legal Education, it is stated that the best estimate of our present legal population runs between 150,000 and 160,000; and it is further estimated that more than double the number required to keep the Bar up to its present numerical strength are being admitted every year. Mr. Shafroth adds that "while increased requirements of general education and legal training are not indicated as a solution to the problem of the over-crowding of the Bar, at least that condition has called attention to these essentials."

Since the movement for higher standards and greater assurance of good character and fitness does not promise to help greatly in solving the growing problem of over-crowding, it is necessary for the Bar to look for help in other directions. And without waiting for more elaborate remedies —if such can be found—the Bar can perhaps do something by simple dissuasion of the more unfit, backed by the evidences of what the young lawyer may expect to have to confront in his early years. The information elicited by the questionnaire of the Association of the Bar of the City of New York may supply some pertinent arguments.

REVIEW OF RECENT SUPREME COURT DECISIONS

Extent of Jurisdiction of Bankruptcy Court over Bankrupt—Conditions Necessary to Create "Common Arrangement" between Rail and Water Carriers — Payment of Freight Charges by Check—Power of Interstate Commerce Commission to Authorize Construction of New Line—Review of Orders of Commission—Proof of Damages Resulting From Violation of Sherman Anti-trust Act—Discrimination in Movement of Railroad Private Cars, Etc.

By Edgar Bronson Tolman*

Bankruptcy—Extent of Jurisdiction of Bankruptcy Court Over Property of Bankrupt

After a bankruptcy court has acquired jurisdiction of a bankrupt's estate and a referee's order requiring sale of all the bankrupt's property has been entered, but before steps have been taken by the trustee to sell land belonging to the estate and located in another judicial district, a court in the latter district cannot proceed to order a sale of such land in a suit to foreclose a mortgage thereon.

Isaacs v. Hobbs Tie & Timber Co., Adv. Op. 332; Sup. Ct. Rep., Vol. 51, p. 270.

This opinion, delivered by Mr. Justice Roberts, dealt with the extent of the jurisdiction of a bankruptcy court over a bankrupt's estate. The question involved was certified to the Supreme Court in the following terms:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

It appeared that the adjudication of bankruptcy had been made in the Northern District of Texas, and that the estate included land in the Western District of Arkansas. Thereafter the appellee brought suit in a state court in Arkansas to foreclose a mortgage on the land in Arkansas. The trustee and the bankrupt were named defendants, and the former appeared and removed the cause to the Federal District court in that District. After removal the trustee filed an answer setting up, among other things, his right and title as trustee, the fact that the land had been scheduled as an asset of the bankrupt, that the bankruptcy court had authorized him to sell the land and that there was an equity in it above the amount secured by the mortgage. He prayed that the court should refuse to order a sale of the land for want of jurisdiction. The court, however, on motion of the plaintiff entered a decree of foreclosure and sale, with a proviso that any surplus of the purchase-money should be paid to the trustee.

In reversing this decree the Supreme Court took occasion to describe the extent of the bankruptcy court's jurisdiction. In this connection Mr. Justice Roberts said:

> Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. . . The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. . . It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. . . When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. . . This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. . . Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation.

The Court then called attention to the practice usually adopted by trustees of enjoining foreclosure proceedings, after there has been an adjudication of bankruptcy, but pointed out that there is no reason why the foreclosure may not be stopped by pleading the bankruptcy adjudication in abatement, as was attempted here.

In conclusion, a contention that the trustee had waived the exclusive jurisdiction of the bankruptcy court was discussed.

> Appellee asserts that inasmuch as the appellant removed the cause into the Federal Court he waived any lack of jurisdiction in that court and estopped himself to set up exclusive jurisdiction of the bankruptcy court. There is no merit in this contention. The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession. . . Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate. . . The action of the trustee in removing the cause could not, therefore, divest the Texas District Court of its jurisdiction.

The case was argued by Mr. William R. Watkins for the appellant and by Mr. John R. Duty for the appellee.

Carriers—Interstate Commerce Act—Regulation of Rates for Shipment by Water

The provisions of the Interstate Commerce Act requiring carriers subject to it to file tariffs with the Interstate Commerce Commission are not applicable to independent water carriers. No common arrangement between a rail

*Assisted by James L. Homire

carrier and a water carrier is shown, making the latter subject to the Act by virtue of Section 6(1)a, where the two carriers pursue practices for the convenient interchange of freight, but are not subject to common control or management, do not operate under through or joint rates, have no agreement or custom relating to the division of rates, and each transports the freight over its own route under a separate bill of lading.

United States v. Munson Steamship Line, Adv. Op. 472; Sup. Ct. Rep., Vol. 51, p. 360.

This case arose in a proceeding brought by the government, at the request of the Interstate Commerce Commission, for a mandamus to compel the respondent, a steamship line, to file schedules covering rates and charges for transporting goods by water from Baltimore to ports in Florida. The theory upon which it was sought to maintain the action was that the goods were being transported partly by rail and partly by water under a common arrangement for continuous carriage and shipment, so that it was subject to the Interstate Commerce Act, under Section 6 (1). The steamship line contended that the transportation by it was an independent water shipment, with respect to which tariffs need not be filed.

The trial court directed a verdict for the respondent, and entered judgment accordingly. This the circuit court of appeals affirmed. On certiorari the judgment was affirmed by the Supreme Court in an opinion by the CHIEF JUSTICE.

From the facts stated in the opinion it appears that the steamship line accepts goods from rail carriers at Baltimore and carries them to Florida ports. The movements are not covered by through bills of lading or under joint rates, and there is no division of rates between the steamship line and rail carriers. The goods are shipped to Baltimore in care of, or with directions to notify, the steamship line, and the name of the ultimate consignee in Florida is noted on the rail bill of lading. That bill, however, shows Baltimore as the destination of the shipment, and the shipper sends it to the steamship line with instructions as to the ultimate consignee. The rail carrier notifies the steamship line of the arrival of goods, and the steamship company notifies the rail carrier on what ship the goods will be transported. The goods are then delivered to the steamship line which pays the rail carrier's charges and issues its own bill of lading to the shipper, specifying its own charges for the water transportation. On delivery in Florida the steamship line collects its own charges and the rail charges which it has advanced, not as agent for the rail carrier or under any agreement with it, but because it has advanced them as an incident to its contract with the shipper.

On this state of facts the issue involved was reduced to the narrow question whether the transportation was partly by rail and partly by water under a "common arrangement" for continuous carriage, it being conceded that there was no common control or management between the parties involved.

The terms of Section 6 (1) (a) and its bearing here were stated in the opinion, as follows:

> The provision of section 6 (1) of the Interstate Commerce Act applies to common carriers as these are described in section 1 of that Act, and the particular description with which we are here concerned is found in subdivision (1) (a) of that section relating to common carriers engaged in
>
> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment."
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> * * *
>
> It is apparent that a mere practical continuity in the transportation is not enough, as the question under the statute is not simply whether there was a continuous carriage or shipment, but whether that carriage or shipment was pursuant to a common arrangement. The provision of the statute, expressing a distinction in the policy of the Congress with respect to water transportation, clearly indicates that it is permissible for a water carrier, receiving at its port a shipment which has been carried by rail from an interior point, to keep its own carriage distinct and independent. While a common arrangement may exist without the issue of a through bill of lading or any particular formality, it is not to be inferred from circumstances which are entirely consistent with the independence which the statute recognizes. In this instance, the facts show that the respondent undertook to maintain its own carriage as distinct and independent by having its separate contract, its independent rate, its direct instructions from the shipper as to its own transportation. The fact that the respondent advised the rail carrier of the sailings of its ships, the place where goods would be received, and the amount of its charges for the water transportation, manifestly did not constitute a common arrangement with the railroad for that transportation. The respondent could take delivery and pay the rail charges upon delivery without sacrificing its right to make, as it did make, its own separate contract directly with the shipper pursuant to which the goods were received and the payment made. The Government stresses the fact that circulars were issued by the railroads as to the respondent's method of shipping and that shippers were generally informed as to the way in which shipments from interior points destined to Florida ports would be handled. But this information merely gave the facts and did not alter the transaction. The respondent did not forfeit its independence merely by making its service convenient, still less by advising both the railroads and shippers of the terms of its service.

The case was argued by Assistant Attorney General John Lord O'Brian for the petitioner and by Mr. W. Colvin Chesnut for the respondent.

Carriers—Freight Charges—Payment by Check

The Interstate Commerce Act does not prohibit the payment of freight charges by check drawn on a going bank and payable on demand, in accordance with the prevailing business custom. A carrier receiving such a check cannot maintain an action to recover the freight charges, after its failure to present the check promptly so that the bank failed before the check was presented and paid.

Fullerton Lumber Co. v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co., Adv. Op. 292; Sup. Ct. Rep., Vol. 51, p. 227.

The suit considered in this opinion was brought in a federal court by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company to recover freight charges on a shipment of coal. The defendant pleaded payment, and proved that it had delivered to the railroad company a check on a local bank, in payment of the charges; that the carrier had delayed in presenting the check for payment, and that meanwhile the bank failed. The trial court ruled that payment of the carrier's charges is required to be paid strictly in currency, under the Interstate Commerce Act, and that the defendant was liable even if the carrier's failure to receive payment was due wholly to its own negligence, and judgment went for the carrier. The Circuit Court of Appeals affirmed the trial courts' judgment.

On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE BRANDEIS, who

explained that the statute does not preclude payment in accordance with the prevailing usage of business.

> It has long been settled that payment of a carrier's charges must be made in money; and that the payment must be cash as distinguished from credit. The purpose of the requirement is solely to prevent rebates or unjust discrimination and to ensure observance of the tariff rates. . . . The Interstate Commerce Act does not in terms prescribe that the charges shall be paid in money; that is, in coin or currency. There is no reason for denying to the parties the convenience and safety incident to making payment, in accordance with the prevailing usage of business, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.
>
> Whether in the case at bar the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of law generally applicable to payment by check. These, and other questions which have been argued, need not be considered by us.

The case was argued by Mr. Stanley S. Gillam for the petitioner and by Mr. A. C. Erdall for the respondent.

Railroads—Power of Interstate Commerce Commission to Authorize Construction of New Line

Under Paragraph 18 of Section 1 of the Interstate Commerce Act the Interstate Commerce Commission has power to grant a certificate of public convenience and necessity for the construction of a new line of railroad, upon the ground that the new line will enable the railroad constructing it to continue to compete with other railroads, on tolerable conditions, for traffic in which it has previously had a share.

Chesapeake & Ohio Railroad Co. v. United States et al., Adv. Op. 445; Sup. Ct. Rep., Vol. 51, p. 337.

This opinion dealt with an appeal from a decree of a district court dismissing a bill brought to annul portions of orders and a certificate issued by the Interstate Commerce Commission relating to the construction of lines of railroad in West Virginia.

The Guyandot & Tug River Railroad Company, a subsidiary of the Norfolk & Western Railway Company, both referred to as the Norfolk, The Virginian Railway and one of its subsidiaries, and the Chesapeake & Ohio Railroad Company made applications to the Interstate Commerce Commission for certificates authorizing extensions of their lines, and all of the applications were heard together and were disposed of by the same report and order. The application of the Virginian was granted, for authority to construct its line from Ittman to Gilbert, and the Norfolk was granted authority to build between Gilbert and Wharncliffe. Authority for the construction of other lines was denied.

The Chesapeake sought to annul the orders granted upon the ground that they were not supported by the evidence and upon the ground that the construction of the line, between Gilbert and Wharncliffe was shown to be contrary to the evidence and to have been authorized on an erroneous theory of law. In this connection it urged that the only finding supporting the order was that construction of the line will enable the Norfolk to compete with it for westbound traffic moving over the Virginian from Gyandot Valley and will assure competitive service to the west to coal operators on the Virginian. It asserted that the Commission is not authorized to grant a certificate of public convenience and necessity upon the naked finding that competition between carriers and competitive service to shippers will result.

The geographic and traffic relationships which the railroads bear to each other are described in the opinion. It will suffice here to mention that they have been competing carriers of coal in the district for a long time, and that the tonnage controlled by the Virginian is about 1/7 of that of the Norfolk and that of the latter about 60% of that of the Chesapeake. The construction of the Gilbert-Wharncliffe line by the Norfolk will enable it to compete with the Chesapeake for westbound traffic originating on the Virginian, and will give the latter greater independence in respect of such shipments, and will enable it to compete with the Chesapeake on tolerable conditions. The construction of a line of the Virginian from the upper Guyandot to a connection with the Chesapeake at Gilbert would improve the position of the latter in respect of westbound movement of coal originating on the Virginian.

In stating the case, MR. JUSTICE BUTLER who delivered the opinion of the Court, summarized the effect of the Gilbert-Wharncliffe line as follows:

> The construction of that connection cannot reasonably be regarded as an intrusion by the Norfolk into territory already being well-served by the Chesapeake. On the contrary the Norfolk already hauls about four-fifths of the Virginian's westbound coal. By this relatively short connection, it will be able to give a better outlet for that traffic, to make substantial saving in the cost of handling, and to remain in position, at relatively slight disadvantage, to compete for traffic in which it long has had a large share. And shippers will have the benefit of such competitive service.

The contention of the Chesapeake, that the Transportation Act does not authorize new construction for the purpose of continuing such competition, was then considered. The Act, Section 1 (18) forbids the construction of new lines until a certificate of public convenience and necessity has been granted by the Commission. Section 1 (20) authorizes the Commission to issue or to refuse to issue the requisite certificate, or to issue it for a portion of the line, and empowers the Commission to attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

> There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. . . .
>
> Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. Indeed sec. 5 (4) of the Act, authorizing the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems, clearly discloses a policy on the part of Congress to preserve competition among carriers. It provides: "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained." And the Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest.

The case was argued by Mr. Robert R. Tunstall for the appellant, and by Mr. Nelson Thomas for the appellees.

Interstate Commerce Commission—Review of Orders of Commission

A finding by the Interstate Commerce Commission that a certain sum is the amount to be included in the balance sheet of a new railroad company, as representing its investment in road and equipment, and a statement in the Commission's report that the company will be expected by a certain date to adjust its accounts in accordance with such finding do not constitute an order subject to judicial review under the Urgent Deficiencies Act.

United States v. Atlanta, Birmingham & Coast Railroad Company, Adv. Op. 349; Sup. Ct. Rep., Vol. 51, p. 237.

The appeal disposed of by this opinion was brought by the Atlanta, Birmingham and Coast Railroad Company from a decree of a district court, three judges sitting, to annul and enjoin an alleged order of the Interstate Commerce Commission. No formal order was made, but the matter under attack was a portion of the Commission's report relating to entries in the carrier's books of account. It reads as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

The United States and the Commission contended that this was not an order within the meaning of the Urgent Deficiencies Act, but their contention was overruled by the district court which entered a decree that the action of the Commission be set aside, and that a supplemental application on which the order was entered should stand for further hearing before the Commission. On appeal the decree of the district court was reversed in an opinion by Mr. Justice Brandeis.

From the facts stated in the opinion it appears that the Atlanta, Birmingham & Coast Railroad Company was incorporated in 1926, by the bondholders of the Atlanta, Birmingham & Atlantic Railway Company, to take over the latter's property on foreclosure. The enterprise had been peculiarly disastrous financially. In 1915, in a reorganization, $35,000,000 in stocks and $14,000,000 in bonds had been wiped out. A further reorganization took place in 1926 in which $30,000,000 more stock was wiped out and the holders of $8,600,000 of bonds received but 60% of their face value in 5% stock of the new company.

The latter reorganization was effected pursuant to an agreement between the bondholders and the Atlantic Coast Line Railroad, under which the committee purchased the property and transferred it to the new company in exchange for all its stock, being $5,150,344.07 redeemable preferred stock and 150,000 shares no-par common. The common stock was transferred to the Atlantic Coast Line in consideration of its extinguishing prior liens amounting to $4,080,699.80, and guaranteeing the preferred stock. The preferred stock was distributed to bondholders.

> "Thus, the Atlantic Coast Line acquired for $4,080,699.80 in cash and its guaranty of the preferred stock, complete ownership of the property subject only to the $5,180,344.07 redeemable preferred stock. These two sums aggregate $9,261,043.87—the sum set forth in the passage of the report of October 9, 1929, which is challenged as an order."

In its order dated December 21, 1926, authorizing the new company to issue its stock, the Commission had provided that for purposes of accounting in Account 41 "Cost of road purchased," the cash value of preferred stock should be reckoned on a basis not in excess of its par value, and that of the common stock not in excess of the amount received for it.

When the books were opened the company's accountants sought to set up in its balance sheet as "Investment in road and equipment" the sum of $29,271,859 instead of $9,261,043.87, contending that the larger sum had been determined to be the value of the property for rate making purposes. The Director of the Bureau of Accounts refused to permit the company to set this up, and directed that the smaller sum be set up.

The company then applied for a hearing in support of its contention and requested oral argument thereon. The Commission denied the application without oral argument. This order was set aside by the district court which directed that the application stand for further hearing. The Commission granted a hearing, and stated by its report that the rate-making valuation was not pertinent in the determination of the investment under the accounting regulations. That report contained the language which the railroad company here contended is an order.

After stating the case MR. JUSTICE BRANDEIS discussed the diversified powers of the Commission and the manner in which they are exercised.

> The jurisdiction conferred upon district courts under the Urgent Deficiencies Act is that formerly exercised by the Commerce Court over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Act of June 18, 1910, c. 309, Sec. 1, 36 Stat. 539. The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. . . . In others, to make determinations. . . . In some, it acts in an advisory capacity. . . . In others in a supervisory. Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do. Such action is directory as distinguished from mandatory. No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review. . . . The accounting regulations which were challenged had been adopted by formal order of the Commission. . . . There are many cases in which action of the Commission although embodied in the form of an order, has been held by this Court not to be reviewable under the Urgent Deficiencies Act.

In conclusion the Court considered the carrier's contention that the decree of the district court on the original bill, in which the appellants acquiesced, constituted a final adjudication of the issues raised here.

> We need not determine whether jurisdiction existed to review the action of April 9, 1928, or the scope of the issues litigated in the original suit. For a finding of jurisdiction to review that order, or acquiescence by the defendants in the decree rendered on the original bill, would not have made *res judicata* the question whether jurisdiction existed to review the later action of October 9, 1929. . . . The lack of power to review, because of the absence of any order, cannot be cured by bringing the suit in the form of a supplemental rather than a new bill. Jurisdiction is equally lacking in either case.

The case was argued by Assistant Attorney General John Lord O'Brian for the appellants and by Mr. Robert C. Alston for the appellee.

Sherman Anti Trust Act—Proof of Damages Resulting from Violation of Act

A party injured by a conspiracy to restrain interstate trade in violation of the Sherman Anti Trust Act is not barred from the recovery of substantial damages by reason of the uncertainty as to the extent thereof, where there is satisfactory proof of the fact that damage resulted from the conspiracy.

Story Parchment Company v. Paterson Parchment Paper Company, et al. Adv. Op. 392; Sup. Ct. Rep., Vol. 51, p. 248.

The question chiefly considered in this case related to the certainty of proof required to sustain an action for damages resulting from a conspiracy in violation of the Sherman Anti Trust Act. The petitioner, a company engaged in the manufacture and sale of vegetable parchment, brought an action for damages under the Sherman Act resulting from a conspiracy between the respondents and another company to monopolize interstate commerce in the business and to exclude the petitioner therefrom and to destroy its business. A verdict for $65,000 was found for the petitioner, and the district court entered judgment thereon for treble damages. The circuit court of appeals reversed this on the ground that the petitioner failed to sustain the burden of proving that it had suffered recoverable damages.

This ground, and the further ground that there was no evidence of a conspiracy to monopolize interstate trade were both considered by the Supreme Court, in an opinion by Mr. Justice Sutherland. In disposing of the case that Court reversed the judgment of the circuit court of appeals and affirmed that rendered by the district court.

As to the lack of proof of a conspiracy MR. JUSTICE SUTHERLAND said:

> There is evidence in the record to the effect that the three companies named, prior to the time petitioner entered the field, had maintained uniform prices and enjoyed a substantial monopoly of the interstate trade in parchment paper. There is also evidence, sufficient to justify the action of the district court in submitting the issue to the jury, that after petitioner began business the three companies combined and conspired to continue this monopoly in violation of section 2 of the Sherman Anti Trust Act, c. 647, 26 Stat. 209. The verdict of the jury and the judgment thereon of the district court have the effect of a finding in favor of petitioner upon that issue; and to that extent the verdict and judgment were sustained by the court below. There is enough evidence in the record to preclude an interference on our part with these concurrent findings. That the petitioner was injured in its business and property as a result of this unlawful combination we think also finds sufficient support in the evidence.

In regard to the question of damages it appeared that the trial court had submitted only two items for the jury to consider, (1) the difference between amounts actually realized by the petitioner and what would have been realized from sales at reasonable prices except for the unlawful acts of the respondents; and (2) the extent to which the petitioner's property had been diminished in value as a result of such acts.

The proof as to the first item was summarized in the opinion, as follows:

> There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward. It does not necessarily follow, of course, that these higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices; and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated. The trial court fairly instructed the jury in substance that if they were satisfied that the old prices were reasonable and that they would not have changed by reason of any economic condition, but would have been maintained except for the unlawful acts of the respondents, the jury might consider as an element of damages the difference between the prices actually received and what would have been received but for the unlawful conspiracy.

This evidence the Supreme Court considered enough to leave open for the jury to determine whether the price cutting and lowering of prices were directly attributable to the combination, and sufficient to render unsound the assumption that the respondents' acts would have been the same if they had been acting independently, with the same resulting curtailment of prices.

The Court then considered the view of the court of appeals that the verdict could not stand because based on speculation and conjecture. In reaching a contrary conclusion, MR. JUSTICE SUTHERLAND emphasized the distinction between uncertainty as to the fact of damages and uncertainty as to its extent.

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. . . .
>
> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. . . . As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. *Allison v. Chandler*, 11 Mich. 542. That was a case sounding in tort, and at page 555 the court, speaking through Christiancy, J., said:
>
> "But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he can not show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice."

The Court pointed out further that there was sufficient evidence in the record to sustain a finding by the jury that damage was sustained through depreciation in the value of the petitioner's plant, due in measurable degree to the respondents' violation of the Sherman Act.

> But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evi-

dence in this record, for the jury "to be determined as a fact, in view of the circumstances of fact attending it." . . . And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts. . . . It would be going far here to say that this qualifying exception has been met.

The case was argued by Messrs. Isadore Levin and Edward O. Proctor for the petitioner and by Mr. Edward F. McClennen for the respondent.

Statutes—Federal Employers' Liability Act—Limitations

Under the Federal Employers' Liability Act the statute of limitations against an action for negligently causing the death of an employee begins to run when the injury resulting in death is sustained, and not from the date on which resulting death occurs. An action is barred, therefore, when the injury involved was sustained more than two years prior to the bringing of the action, although the action is brought within two years from the date of death.

Flynn v. New York, New Haven & Hartford R. R. Co., Adv. Ops., 471; Sup. Ct. Rep., Vol. 51, p. 357.

This case involved a construction of the statutory limitation placed on actions brought under the Federal Employers' Liability Act. The action was brought for negligently causing the death of one Flynn. The injury in question occurred more than two years prior to the institution of action, but death occurred within the limitation period of two years.

In an opinion by MR. JUSTICE HOLMES, the Supreme Court ruled that the action was barred, upon the ground that the period of limitation commenced, not when death occurred, but when injury was sustained.

> The Act of 1908 gives a right of action to the employee or, in case of his death, to his personal representative for the benefit of the widow and children and provides that no action shall be maintained "unless commenced within two years from the day the cause of action accrued." §6. Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. . . . On this ground an effective release by the employee makes it impossible for his administrator to recover. . . . The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, . . . and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this Court.

The case was argued by Messrs. William F. Geenty and Thomas R. Fitzsimmons for the petitioner and by Mr. Edward R. Brumley for the respondent.

Interstate Commerce Act—Application of Provisions Against Discrimination—Movement of Private Cars

The transportation of private cars, including office cars, of one railroad carrier by another carrier free, or at other than the tariff rate charged for the transportation of the private cars of other persons, constitutes discrimination in fact against other owners of private cars, and is not justifiable upon the theory that such transportation is not a shipment of property subject to Section 6 (1) of the Interstate Commerce Act, or upon the theory that it is incidental to the transportation of persons riding on free passes within the classes permitted by Section 1 (7) of that Act.

Louisville & Nashville R. R. Co. v. United States, et al., Adv. Op. 407; Sup. Ct. Rep. Vol. 51, p. 297.

The issue involved in this appeal was the validity of an order of the Interstate Commerce Commission relating to the use of private passenger train cars. The Commission, after an investigation instituted on its own motion, entered an order requiring the railroad carriers to cease and desist from the transportation of private passenger train cars, including so-called office cars, of another carrier free, or at other than published tariff rates.

Another order of the Commission, also attacked, provided that a car pass may be issued only for cars owned or leased by the carrier for use in its business as a common carrier, and may not be issued for other cars.

The District Court for Western Kentucky sustained the order, and the carriers appealed from a decree dismissing their petition. On appeal the decree was affirmed by the Supreme Court in an opinion by the CHIEF JUSTICE.

The Commission's investigation disclosed that the carriers transported free of charge the private, or office, cars of other carriers when occupied by persons for whose transportation it was lawful to issue a pass. Private cars owned or chartered by persons other than carriers were transported in passenger trains under tariffs providing certain minimum charges, which were intended to cover the service of moving the cars rather than their contents.

The Commission concluded that the transportation of private cars free, or at less than published rates, while charging for other privately owned cars, was unjustly discriminatory. It also concluded that transportation of other carriers' cars was transportation of property, and, since free transportation of property is permitted only within the exceptions provided for in Section 22 of the Interstate Commerce Act, that this was a violation of the Act. It pointed out, however, that the finding does not mean that it is unlawful for one carrier to transport private cars of another, but merely that under existing law such transportation should be paid for on the basis of a just and reasonable charge.

The carriers advanced two contentions in their attack on the order; (1) that the movement in question "is not a shipment of property subject to Section 6 of the Act," which relates to property shipments; (2) that the transaction does not violate the provisions against discrimination.

The latter point was considered first in the opinion of the Court. As to it the CHIEF JUSTICE declared that in view of the findings there was no doubt as to the fact of discrimination. The carriers contended, however, that the practice must be held, as a matter of law, not to be unjust discrimination, since it was sanctioned by the Interstate Commerce Act. But the Court held otherwise, and after pointing out that as a means of wiping out the evil of discrimination, free transportation had been prohibited, with specified exceptions, said:

> If discrimination, which would otherwise be unjust and condemned by the Act, can be deemed to be saved by the exceptions stated, it must be either because the transportation of a private car is to be regarded as incidental to the free transportation of a passenger who may hold a pass, or because the transportation of a private car occupied by a passenger with a pass is not a service rendered under sub-

stantially similar circumstances and conditions as that of the transportation of a private car with passengers paying fares. . . Neither of these propositions is tenable. The pass which the statute allows is in lieu of the passenger's fare and is for the transportation of the passenger. The terms of the statutory permission go no further. Passes may be given under the statute to a variety of persons, including not only the principal officers of railroad companies but the agents and employees of common carriers, and their families, including among others, for example, furloughed and superannuated employees, and those who have become disabled or infirm in the service of a carrier, and also "the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier". It would hardly be thought a reasonable contention that the transportation of a private car should be deemed incidental to the free transportation of all the persons in the categories mentioned. But so far as the pass *per se* is concerned, the hauling of a private car occupied by such a person is as much, and as little, incidental to the pass in one case as in any other. Even in the case of a railroad official, it appears that if he owns the private car, its transportation would be subject to the tariff charges on privately owned cars, (155 I. C. C. p. 788). The distinction, then, must be found, not in the fact that a pass may be issued for the transportation of the passenger, or that the passenger is a railroad official, but in the fact that the private car in which the holder of the pass is traveling belongs to another carrier. We find nothing in the terms of the statute recognizing such a differentiation.

Consideration was then given to the contention of the carriers that the movement of carrier-owned private cars is not a shipment of property within the meaning of the provisions forbidding free transportation. In support of that contention the carriers argued that the movement is to be regarded as a facility of the carrying line, ranking as its own for purposes of service. A sufficient answer to this was found in the Commission's finding.

The Commission dealt with the question when railway equipment generally may be transported without charge. The Commission said that, of course, a carrier may transport its own property without the payment of tariff charges; that, likewise, property which is hired or rented for the performance of its common-carrier duties may be transported in the same way as property which it owns. The Commission reviewed the terms on which freight cars and passenger cars move over foreign lines. It found that "so long as a car is being handled for revenue purposes, it is in service and not subject to charges; but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line." The Commission further found that "the criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line."

The evidence indicated that the foreign line handling the carrier-owned car does not hire it, because it would have no interest in doing so and pays no rental for it.

The Court approved the Commission's conclusion

"that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its performance without charge, on the same principle as the free handling of revenue-producing equipment."

In conclusion, the Court pointed out the reasons why the long continued administrative approval of the practice by the Commission should not be determinative of the proper construction of the Act in this regard, as contended by the carriers.

The act has been repeatedly amended, and has been reenacted, without any change directed to the correction of this practice. It is strongly urged that in the light of these circumstances the administrative construction should be determinative. The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons. . . But that principle does not go far enough to control the decision here. There is no ambiguity in the requirement of section 6 (1) of the Act that its provisions as to published tariffs "shall apply to all traffic, transportation, and facilities defined in this Act". Whether the private, or office, cars of other carriers are to be deemed property transported, or a facility of the carrying line, depends upon the circumstances of the carriage as matters of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute. Similarly, there is no ambiguity, so far as the terms of the provision of section 3 (1) are concerned, in its prohibition of discriminations, when it has been found as a fact that these cars are transported for the benefit of the owning line and do not belong in the category of the facilities of the carrying line, and that transporting them free of charge constitutes an unjust discrimination, as compared with the tariff charges for the transportation of privately owned cars. . . Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND were of opinion that the decree should be reversed.

Kansas City Southern Ry. Co. v. United States, Adv. Op. 417; Sup. Ct. Rep. Vol. 51, p. 304, was an appeal from the District Court for Western Missouri, in which the same orders were attacked. The petitioners there were parties to the proceeding before the Commission, and attacked the Commission's requirement,

"So far as it prohibits the movement of an office car of another carrier upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad."

In a brief opinion in this case the CHIEF JUSTICE first considered an objection to jurisdiction and pointed out that the Urgent Deficiencies Act does not prohibit different parties affected by the same order of the Commission to attack it in different districts. As to the substantive question raised, the Court said:

Upon the merits, the appellants present the argument that a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in relation to such transportation. There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act. . . But a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation. This applies to its transactions with other carriers.

The case was argued by Mr. Alfred P. Thom for the appellants in the *Louisville and Nashville* case, and by Mr. Daniel W. Knowlton for the appellees, and by Mr. Samuel W. Moore for the appellants in the *Kansas City Southern* Case, and by Mr. Daniel W. Knowlton for the appellees.

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

ORGANIZING THE POWER OF THE AMERICAN BAR

First Formal Proposal to Nationalize Power of American Bar Made Eighteen Years Ago—General Features and Explanation of Plan—Main Aim Still Unattained—Association Needs Changes to Enable It to Formulate Rationally Its Convictions as a Representative Body and to Activize Its Latent National Power With Maximum Effect

By John H. Wigmore

IT will be just eighteen years ago in August that the first formal proposal was made to nationalize the power of the American Bar. That proposal, failing at that time, has now become an inevitable movement, which only awaits for its realization the discovery of an acceptable practical plan.

But the odd thing is that the now forgotten plan, proposed in a certain quarter eighteen years ago, is substantially identical in idea with the one now independently favored in several quarters. Less than a dozen persons were officially concerned with the earlier proposal; and most of those have now passed on. So, as the writer was the principal author of it, the Editor of the Journal has given consent that the main features of it be here recalled; for it has both a present and a historical interest.

It originated with a resolution, introduced by Nathan William MacChesney and the writer, and adopted at the Montreal meeting of the Association in 1913. The resolution read:

"Resolved, That a special committee of five members be appointed by the President of the Association to consider and report to the Executive Committee what amendments to the Constitution and By-Laws would be desirable with a view to increasing the membership of the Association, improving its order of business, and extending its influence in the profession and in the community at large."

The Committee appointed under this resolution consisted, besides the writer as Chairman, of four ex-presidents of the Association, Simeon E. Baldwin, of New Haven, Jacob M. Dickinson of Chicago, Stephen S. Gregory of Chicago, and Walter George Smith of Philadelphia. After a year and a half of deliberation (including a questionnaire to elicit opinions from officers of the National and State Associations; for which, see this Journal for October, 1915), the Committee majority of three reported against the changes of Constitution and By-Laws proposed in the Chairman's draft, which thus figured as a minority report. Walter George Smith, concurring in the minority report, wrote thus to the Chairman:

"I wish to say that I have read and considered the proposed amendments, both to the Constitution and By-Laws, and I heartily approve of them, and believe that they will accomplish the purposes for which they are intended. I wish further to say that you have rendered the Association and the profession a great service by the thorough and efficient consideration which you have given to this matter, and for myself I wish to convey to you my sincere thanks."

But the Executive Committee, at its January, 1916, meeting in Washington, adopted the majority report against the changes, and even refused to print the minority report for consideration by the Association. That minority report, however (a document of 62 printed pages) was printed by aid of a gift from the American Judicature Society, and was circulated to the (then) 10,000 members of the Association. It soon went into the members' wastebaskets, and only a rare few copies are now extant.

No effort was made by the losing minority of the Committee to press the consideration of the report. This was because of Mr. Elihu Root's advice, prior to the August, 1916, meeting in Chicago. I recall clearly the picture of my interview with him, in his parlor at the Congress Hotel. He expressed his agreement with the general aim of the Report, but deemed the time premature for the concrete measures of constitutional change proposed in the Report. But he did recommend to the Executive Committee the partial extension of the section system, as proposed in the Report, and it was adopted at that meeting of the Association. Apart from this, the Report never came to anything.

So much for the history. Now for the proposed measures themselves.

General Features of the Proposals

They were nothing radical. They offered five general measures for improving the power and efficiency of the Association by extending certain existing features.

The first two measures aimed to link up gradually the National Association with the State Associations; assuring some personal connection between the two, without affecting the autonomy of either.

The third measure aimed to secure efficiency in the procedure at the Annual Meeting.

The fourth measure aimed to make more effective, in legislation and public opinion, the views adopted at the Annual Meeting's deliberations.

The fifth aimed to consolidate the management of the publications of the Association.

Concretely, the five measures were the following (of course the exact wording, in amendments to the text of constitution and by-laws, was set forth in the Report):

1. *Membership.* To add to the present qualifications a requirement that the applicant shall be a *member of his State Bar Association.*
2. *Officers.* (a) To make the *Local Council* in each State *elected by the State Bar Association,* and the *General Council nominated* by the *Local Council,* and (b) to *enlarge* the Local Council to seven or ten in number, and the General Council to two in number, from each State.
3. *Conduct of Meetings.* To *extend the present Section System,* by expanding the Sections to

seven, merging with them most of the Standing Committees, and fully enlarging the membership of these Committee-Sections; these Committee-Sections to meet simultaneously (but not at the same hours as a General Meeting), for the resolution of all matters concerning general law and practice; the business of each Committee-Section being prepared by a Chairman and Sub-Committees, corresponding to the present Standing Committees.

4. *Promotion of Measures.* A *new officer,* the Legislative Chairman, to be given general supervision and responsibility for promoting all measures recommended by the Committee-Sections.
5. *Publication.* To substitute a *Publications Secretary* (virtually General Editor) for the present Publication Committee.

All of the proposed amendments were merely detailed provisions for effective five simple changes, while making the least possible alteration in the organization or the traditional methods of the Association, and by merely adapting existing institutions.

Explanation of the Proposed Measure

In order to survey completely and discuss concretely any measures of needed change in the Constitution and By-Laws, the activities of the American Bar Association may be classified as follows:

I. Membership of the American Bar Association and affiliated bodies; Qualifications, Admission, and Discipline; this part may be termed the *Membership Affairs.*
II. Election of Officers, including Council and Committees; this part may be termed *Organization Affairs.*
III. Deliberations and Recommendations as to the State of the Law and Practice and the General Interests of the Profession; this part may be briefly termed the *Deliberative and Advisory Affairs.*
IV. Financial affairs, dues, expenses, etc., this part may be termed the *Financial Affairs.*
V. Sundry Administration matters, inculding the Journal and other publications; this part may be termed *General Administration Affairs.*

Taking each of these activities in the order named, the concrete proposals were stated and justified in the following terms:

I. MEMBERSHIP AFFAIRS

"For the better co-ordination of the membership of the American Bar Association, so as to make it systematically representative of the entire profession in the United States, to insure the proper local professional status of all members, to encourage mutual interest between the American Bar Association and State Associations, and to strengthen the influence of the profession as a whole, establish the following principles for membership:

"1. No person shall become a member of the American Bar Association who is not already a member of the State Bar Association (if there is one); this rule not to apply retroactively to persons already members of the American Bar Association.
"2. Preserve the principle established at Milwaukee, by merely *adding* the foregoing to the present qualifications; *i. e.,* an applicant to the American Bar Association who is already a member of the State Bar Association must still be nominated and elected under the conditions now obtaining.
"3. As now, the Local Council from each State would nominate, and as now, the General Council would have to approve. No change at all would here be involved.
"4. Lapse of membership in the Bar Association of a State shall involve cessation of membership in the American Bar Association.
"5. Special membership, by election by the General Council, to be provided for professors of law, judges, or other individuals of legal attainments who, being not members of a State bar or of a State Bar Association, by reason of some local rule as to eligibility, are ineligible to the American Bar Association under Rule 1, above.
"6. In States having no Local Council, the General Council to nominate directly, as now.

"The effect of the simple provision of Rule 1 above would be to link up the State Bar Association to the National Bar Association *by a purely personal tie.* There would be no official connection, and no control of the one by the other, officially or otherwise; and no obstructive federation hampering the action of either. But there would be ensured, gradually, a sense of common professional interest and duty, and a personal spirit of co-operation. The National Association would stand out as the select central force of the entire profession. The main point of the improvement would be that *without any connection of machinery or organization whatever* the National Association would be assured of a close personal touch with the State Associations."

II. ORGANIZATION AFFAIRS

"*a. President.* To be elected by the Association, as now.
"*b. Vice-Presidents.* One from each State; to be elected by the Association, as now.
"*c. Secretary.* To be elected by the Association, as now.
"*d. Treasurer.* To be elected by the Association, as now.
"*e. Assistant Secretaries.* To be elected as now.
"*f. General Council.* (1) *Two* members from each State (instead of *one* as now), to be nominated *by the Local Council* from each State (instead of by the Association, as now), but *elected* by the Association, as now.

(2) The General Council to be a Standing Committee on Nominations for Office, as now.

"*g. Local Council.* (1) To be not less than *seven* nor more than *ten* (instead of *two* to *four*) with the Vice-President; to be elected *by the Bar Association of the State* (instead of by the American Bar Association Meeting, as now).

(2) Where the State Bar Association does not act for 60 days before the Annual Meeting, to be appointed by the President.

"*h. Executive Committee.* Seven, to be elected, as now.
"*i. Committee-Section Chairman.* To be appointed by the President, as now for Committees; or, to be elected by the members of the Committee-Section, as now for Sections.

Reason for the above proposals:

"f. g. The chief innovation here is the selection of the *Local* Council by the *State Bar Associa-*

tion, and the nomination of the *General* Council members by the *Local* Council.

"The objection likely to be raised here is that the General Council and the Local Council have hitherto always been selected from those persons who have shown most interest in the affairs of the American Bar Association, and that to relegate the selection to the local Bar Association might often result in transferring the control of the American Bar Association from the hands of those who have done most for it, and would place it in the hands of others who might be unfamiliar with its traditions and indifferent to its interests.

"This objection would have considerable force (at least for some States), as applied to the transition period of the first few years. This could be obviated by postponing its operation for three or five years.

"But, in general, and after the transition period, the objection is not valid. A serious shortcoming of the present system is that its natural effect is to keep the American Bar Association out of all direct touch with the State Bar Association, by leaving the leading spirits of the former quite independent of the latter. This is the very feature which ought to be removed, if we believe in the soundness of some sort of co-operative or federated relation.

"The effect of the proposed rule, on the other hand, would be *to force* the men who now are interested in the American Bar Association to *become interested also* in the State Bar Association, and to serve as a natural bond between the two. They would be obliged to go down among the State Bar Associations and show an interest in the State profession, in order to receive the support of the latter for election upon the Local Council of the American Bar Association.

"This is in fact the case already with a great many officers of the Local Councils of the American Bar Association who are also active in their State Bar Associations. Shining examples abound. And these ought to be typical cases. Any healthy organization of the American Bar Association must plan to induce an interrelation as the natural effect of its constitution.

"The above plan seeks to attain the benefit of the federative principle, not by any rigid official interlocking which would destroy the autonomy of the State Bar Association, and would hamper the movement of the American Bar Association, but by a *personal bond* between the State Association and the American Bar Association. No system of federation which tied up the action or the organization of the State Bar Associations, so as to limit their autonomy or require their joint action would be accepted either by our State Bar Associations or by the American Bar Association. Nor is there any need for it. But what is needed is that there should be a true and cordial familiarity each with the affairs, traditions, temper, and work of the other. And this is to be attained by the simple expedient of creating a personal bond. If the General Council is nominated by the Local Councils, and the Local Council is selected by the State Association, this personal bond is assured.

"And by the membership (as now) of the American Bar Association Vice-President, elected by the American Bar Association itself, in each Local Council as Chairman, is ensured a proper domination of the influence of the American Bar Association and a personnel likely to represent its own choice.

"i. The other question calling for solution is the mode of selecting the Chairman of the Committee-Section. The present Sections elect each its own Chairman and Secretary; the discussions, and the professional intimacies of the members, make this a good method. The present Standing Committee Chairmen, on the other hand, are appointed by the President. Under the proposed plan of enlarged Committee-Sections, it is open to speculation which of the existing methods would work the better. But with a view especially to the wise and deliberate co-ordination of the work of the Association it would seem better to provide for appointment by the President, with approval of the Executive Committee."

III. DELIBERATIVE AND ADVISORY AFFAIRS

"*a. Re-group and Consolidate the present subjects* of the present Standing Committees and Sections, into a smaller number of Committee-Sections, placing each Committee-Section more on the footing of a Section, but giving it some features of both the present Sections and the present Committees, as follows:

"*b. Enlarge each such Committee-Section* to include:

(1) At least one member *from each State and Territory,* and

(2) As many more members at large, not to exceed say fifty, as will serve to take in an adequate number of members specially expert and interested in the particular subject.

(3) Such other members of the American Bar Association as may register at the meeting as members of the particular Committee-Section.

"*c.* Rely upon the Annual Meeting as the period for full and *final debate* and *settlement* of the topics coming under the jurisdiction of the *Committee-Sections;* by

(1) Allowing two full days of the Annual Meeting for the open deliberations of the Committee-Section;

(2) Making the meeting of the several Committees-Sections simultaneous (as is now the case with the Sections), thus permitting two days for each (but not at the same hour as a General Meeting).

"*d.* Ensure a *representative character* for the recommendations finally reached by each Committee-Section, by

(1) Composing the membership as above in *b*;

(2) Permitting all other members of the American Bar Association who show enough interest to register in the Section to take part in the discussion and vote.

"*e.* Ensure a *responsible* discussion *and decision* of the measures by

(1) Providing a Chairman and Secretary (and also an Advisory Committee of three or five more) for each Committee-Section, whose duty and practice it will be to circulate beforehand, to the members of the Committee-Sections, all proposed measures, to formulate drafts, and to arrange an order of business;

(2) Limiting the vote at the meeting to members of the Committee-Section, as above described:

"*f.* Provide *finality* for such deliberations, and

eliminate waste of time and irresponsible and ignorant discussion, by

(1) *Removing from the order of business* in the General Meetings of the American Bar *Association at large* all matters falling within the jurisdiction of the Committee-Sections:

(2) *Abolishing* the necessity for any *further sanction by* the *General Meeting* of the Association, of the recommendations made by the Committee-Sections.

"Reasons for the above:

What is accomplished by the above measures?

"(1) All topics proposed for recommendations by the Association on matters of substantive law and practice receive consideration from a truly *representative, nation-wide* body of members of the Association.

"(2) *Ample time* is given for thorough deliberation.

"(3) The vote is so distributed that it substantially *represents the attitude of the Association* quite as well as if every member present was in attendance, and much better than in fact it does under the present system and practice.

"(4) The simultaneous meeting of six or seven Committee-Sections interferes very little with the attendance of those who are really most interested in the respective subjects. And any attempt to provide time enough for a discussion worth the name must involve some such simultaneous meeting.

"(5) The subjects are distributed among the Committee-Sections, with fair evenness as to quantity, so that each Committee-Section will have plenty to occupy it. If some of the Committee-Sections do not need all their time, others will.

"(6) All matters of administrative detail and Association management are reserved for the Executive Committee, the General Council, and the Association, precisely as at present.

"(7) The Annual Meeting of all members will still retain plenty to do, and will lose none of its just prerogatives or active interests.

"Re-grouping of the Committee-Sections. Under the above plan, the present Standing Committees and Sections would be re-grouped, as to the subject-matter of their respective jurisdictions, into the following Committee-Sections:

"(A) *General Law and Practice.* To include the present Standing Committees on (1) Jurisprudence and Law Reform, (2) Professional Ethics, (3) Law Reporting and Digesting, (4) Taxation, and the following Special Committees on (1) Drafting of Legislation, (2) Government Liens on Real Estate, (3) etc.

"(B) *Commercial Law.* To include the present Standing Committees on (1) Commercial Law and (2) Insurance Law, and the Special Committees on (1) Courts of Admiralty, (2) etc., etc.

"(C) *Procedure and Courts.* To include the present Standing Committee on (1) Judicial Administration and Remedial Procedure and the Special Committees on (1) Uniform Judicial Procedure, (2) Judicial Recall, (3) Remedies for Delays and Costs in Litigation, (4) Compensation to Federal Judiciary, (5) etc., etc.

"(D) *Legal Education and Admission to the Bar;* to include (1) the present Standing Committee on that subject, and (2) the present Section of Legal Education. There is no longer a need for the separation, and it tends to dissipation of energies.

"(E) *Comparative Law and International Law.* To include (1) the present Standing Committee on International Law and (2) the present Comparative Law Bureau. The two fields are contiguous and partly overlap; the persons expert and interested are partly common to both; and the special outside membership in the Comparative Law Bureau can easily be adjusted.

"(F) *Patents, Trade-marks and Copyright.* To include (1) the present Standing Committee on that subject and (2) the present Section on that subject. The subject itself is not indeed large enough for a separate Committee-Section and should naturally be merged with that of Commercial Law. But the personnel is so special that it would presumably insist on a separate organization.

"(G) *Judiciary.* To include the present Judicial Section, with its present limitations.

"In the above list, three Standing Committees are not accounted for:

"On *Grievances:* this Commitee has little business, and such as it has can best be relegated to the local Council, to report to the General Council so far as expulsion from membership might be involved.

"On *Publications:* the work of this Committee would go to an Editorial or Publications Secretary, for coördination of the entire task in a single hand.

"On *Uniform State Laws:* this Committee is superfluous; the work of the Uniform State Laws Conference needs no indorsement by the American Bar Association, and in view of the exhaustive discussion of topics in the National Conference, the scanty consideration allowable in the American Bar Association gives little independent value to its votes on these matters. But the business of this Committee could be included in the Committee-Section on General Law and Practice.

"On the above plan, it would naturally evolve that these various topics of Law and Practice now allotted to Special Committees would be first brought up in some Committee-Section and referred to Sub-Committees for the ensuing year. To decide conflicts of jurisdiction, or the inappropriate assumption by one Committee-Section of a topic falling properly within the jurisdiction of another, the Executive Committee would by its general powers re-allot the topic in the interim between meetings, by transferring the subject to the appropriate Committee-Section. As all subjects involving recommendations of legislation require a distribution of the proposal in print before the Annual Meeting, this control can easily be exercised.

"All Committees on subjects not involving a recommendation for legislation would naturally report to the body creating them, i. e., the General Meeting, the specific Committee-Section, the General Council, or

the Executive Committee; subject to the Executive Committee's control in re-allotting them."

IV. FINANCIAL AFFAIRS

"The financial affairs of the Association to remain as at present in the hands of the Treasurer and the Executive Committee."

V. GENERAL ADMINISTRATIVE AFFAIRS

"*The Promotion of Measures Recommended,* and all other action on behalf of the Association to promote the legislation recommended by the Committee-Sections, should be specially concentrated into the hands of a single officer, who should have the official cooperation of other persons best adapted to assist. Call this officer the Legislative Chairman, or something of the kind. Let all Chairmen of the Committee-Sections be ex-officio on his Committee, also the President, the Vice-Presidents, and the Secretary of the Association. Let him be chosen for his vicinity to Washington, and for his experience and standing in public affairs. Let him associate with himself, for each measure, the Chairman of the appropriate Committee-Section, and when desirable, the President, the Vice-Presidents, and the Secretary of the Association. Then, instead of the casual and disconnected handling of the various proposals by different members unacquainted with each other's doings, the whole group of measures under recommendation for legislation will be co-ordinated under a single supervision and presented with the best prospects of acceptance.

"This officer would therefore need a special new provision in the Constitution."

The remainder of the Report, under this head, proposed the consolidation of the publications of the Association under a single officer. This feature of the proposal has long ago been fully met by the establishment of the JOURNAL of the Association and of the Executive Secretary's office.

The report concluded as follows:

"The foregoing details, it is believed, bear out the statement in the Summary that the present proposals are reducible to five simple measures, which are not radical innovations, but are merely adaptations of existing institutions to new conditions brought about by the growth of the Association and of the profession.

"It is believed that these proposals do not remove a single important feature or cherished tradition of the Association, nor tend in any way to affect its spirit of fellowship or its professional distinction. Rather they will assist in increasing its effectiveness, in solidifying its influence in the profession, and in enlarging its usefulness in the community."

Looking back over the sixteen years that have elapsed since the preparation of that Report, it still seems to the writer that the main aim of the proposed measures is still in need of attainment, viz. *Power.* What the Association as a body still lacks, and ought to have, is the *power to represent, actively and rationally,* the *convictions of the entire legal profession in our country.* In the forum of public opinion the Bar is held responsible. But, owing to its outgrown organization, it still lacks the power that should always go with responsibility. Take, for example, the Association bill for Federal Rules of Court; that bill has been pending for eighteen years in the Federal Senate. If the Association was so organized as to represent the full force of the national power which it really possesses, that bill would have passed long ago.

What the Association now needs, most of all, is such measures of amendment to its Constitution and By-Laws, as will enable it to formulate rationally its convictions as a representative body and to activize its latent national power with maximum effect.

AMERICAN LAW INSTITUTE HOLDS NINTH ANNUAL MEETING

(*Continued from Page* 358)

—thirteen. It may well be that some states included in the negative list should be included in the other. That is a transfer which will be very cheerfully made upon notification. It also may be that in some instances expected annotations will fail to appear. But from information recently received from many states I know that the work is actually being done day by day in a great many law libraries and that in many states a very substantial portion of it is already in manuscript. The faithfulness with which this purely voluntary undertaking is being performed is a constant source of both amazement and delight.

"In several of the states included in the minority list sincere efforts have been made to get the work under way, but have not yet borne fruit. It is not too much to hope that by next year they may be included. It is a pleasure to report that in only a few instances do we fail to get interest or response from a local association.

Annotations for Conflict of Laws

"So far the emphasis has been upon the program for Contracts annotations. In states where that is under way under circumstances that promise successful completion, attention should be given to Conflict of Laws, which will be the next Restatement published following Contracts. Conflict of Laws work is now being done in more than twenty states. There seems no need to crowd it, if it is progressing satisfactorily. The bulk of case law is not so great in Conflict of Laws as it is in Contracts and a local annotation does not involve the handling of so much material. But Conflict of Laws should receive attention this year in every state where Contracts is satisfactorily under way. That will insure the completion of Conflict of Laws annotations in time to accompany the official Restatement of that subject."

These reports were preceded by that of the Treasurer, George Welwood Murray and followed by the report of the Committee on Membership, of which Mr. George E. Alter is Chairman. The remainder of the sessions on Thursday, Friday and Saturday were taken up in discussion of the various drafts. Of these, Tentative Draft No. 1 on the Administration of Criminal Law, as might have been

expected, provoked the liveliest discussion. The proposed statute on "Summoning Witness in one State to Testify in Another State," passed with practical unanimity, after certain explanations by the Reporters. But this unanimity immediately vanished when the proposed measure dealing with "Killing or Wounding to Effect Arrest," came before the meeting. A Prefatory Note, printed before the proposed measure, and signed by Director Lewis, apprised the meeting of the difference of opinion in important respects which existed between the majority of the Reporters and Advisers and the Council of the Institute. It called attention to certain amendments which the Council thought should be made to the draft as submitted by the Reporters—which amendments were printed in Italics in the black letter text of the Act approved by a majority of the Reporters and Advisers. This difference of opinion was immediately reflected in the discussions on the floor, which dealt in the main with the extent to which it was advisable to limit the right of police officers and private persons to inflict death in making an arrest for felony. The matter was finally referred to the Reporters and their Advisers for further consideration.

Text of Approved Act for Summoning Witness etc.

The proposed statute on "Summoning Witness in one State to Testify in Another State," as approved by the Institute, reads as follows:

"Section 1. Summoning witness in this state to testify in another state. If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in criminal prosecutions in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, that a person being within this state is a material witness in such prosecution, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall notify the witness of such time and place.

"If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution in the other state, that the witness will not be compelled to travel more than one thousand miles by ordinary public conveyance, and that the laws of the state in which the prosecution is pending and of any other state through which the witness may be required to pass by ordinary course of travel will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending at a time and place specified in the summons.

"If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that his attendance is required, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

"Section 2. Witness from another state summoned to testify in this state. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions in this state, is a material witness in a prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

"If the witness is summoned to attend and testify in the criminal prosecution in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that his attendance as a witness is required. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate.

"Section 3. Exemption from arrest and service of process. If a person comes into this state in obedience to a summons directing him to attend and testify in a criminal prosecution in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

"If a person passes through this state while going to another state in obedience to a summons to attend and testify in a criminal prosecution in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons."

Comment on Fact Defendant Did Not Testify

The Tentative Draft on the Administration of Criminal Justice showed that there was a marked contrariety of opinion among Reporters and Advisers as to the proper rule in regard to comment on the fact that defendant did not testify. Six proposals were submitted to the meeting for consideration and the last was adopted. It reads:

"VI. The judge, the prosecuting attorney and counsel for the defense may comment on the fact that the defendant did not testify.—Three Advisers (first choice of one)."

On Friday evening, at a meeting presided over by Director William Draper Lewis and largely attended by members and guests of the Institute, Professor Manley O. Hudson, of the Harvard Law School, delivered an interesting and informative address on "The Research in International Law."

There were the usual social events in connection with the meeting. At the banquet Saturday evening addresses were made by Miss Ada Louise Comstock, President of Radcliffe College; Dr. E. A. Gilmore, Dean of the School of Law of the State University of Iowa, and Solicitor General Thacher.

COMPULSORY UNIT OPERATION OF OIL POOLS

Conditions Obtaining in the Oil Industry Which Make Question of State's Power to Enforce Unit Operation or Something Analogous to It One of Vital Importance—Pertinent Decisions of United States Supreme Court—A Kansas Case Directly in Point—Constitutional Right of Property Owners as Recognized in Texas Case — Significant Analogy Supplied in Drainage Decisions*

By W. P. Z. German
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SOME attention should be given to definitions. The term "unit operation" may have at least two meanings, one being the merging of titles and the development and operation of the one unitized area as if it were one tract of land held under a single oil and gas lease according to a definite program intended to accomplish a maximum recovery from the pool as a whole at a minimum of cost. It is incomplete when the royalty owners do not also merge their titles to their oil and gas rights in the area and is complete when they do. The other is not accompanied by any merger of titles, but the development and operation of the area are in accordance, as nearly as reasonably practicable, with such a program. This second conception may be nothing more than a cooperative development and operation plan, but in this paper it is regarded as more than that. If there cannot be unit operation without a merger of titles, then it would seem that the state cannot require unit operation for it cannot require a merging of titles; but if it may consist in requiring each and all of the leaseholders to develop and operate or to submit to a development and operation according to some such common plan as is referred to above without at the same time requiring a merger of titles, then it would seem that unit operation may be required by the state. Whether the states have this power is the subject to be herein considered. If the state can so bind the several lessees, it also can so bind the several lessors.

The writer does not know what would be an ideal plan for the development and operation of a pool; but it takes into account the fact that the accumulation of gas and oil is not uniform throughout the formation; that often free gas, highly compressed, occupies the upper portions of the reservoir, the oil with compressed gas in solution coming next in order; that at places oil is not overlaid with free gas, and sometimes there are peaks where free gas is not immediately underlaid with any oil; and the fact that these substances are held under a uniformly distributed pressure, generally referred to as "rock pressure." It also recognizes that the most efficient utilization of this naturally-existing reservoir-pressure in the recovery of the oil requires that there be no operation of wells completed into areas where gas only has accumulated, for this diminishes the pressure, withdraws gas which could migrate to oil-bearing areas, and draws gas out of solution with oil, all to the detriment of oil recovery; and that there shall be only an operation of wells which are completed into oil-saturated areas. The gas would be thus recovered along with the recovery of the oil, and at the same time there is a most beneficial use of the rock pressure. Some believe that it is preferable that the oil lowest down the slope shall be first extracted. The superiority of unit operation over proration as we know it today is obvious. Among other differences, proration ignores an orderly development of a field, whereas unit operation recognizes and enforces it.

The authority of a state to intervene and correct evils of the type we are discussing is called its "police power." This power of a state is vested in its legislature, and is to be manifested by the enactment of laws. Blackstone defines this power as the due regulation of the domestic order of the kingdom whereby the inhabitants of a state are bound to conform their behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations. Cooley says that it includes regulations by which the state seeks to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others. It has been said that all police power rests upon the common-law maxim that every person shall be required so to use his property as not to injure the rights of others.

There are at least four conditions which obtain in the oil industry which might well justify an exercise of the police power of the state, if the power extends that far, to enforce the unit operation of oil fields or something analogous to it, whenever it cannot be had by agreement. These are:

First: The existence in oil fields of so many separate individual holdings, in small tracts of land;

Second: The migratory nature of oil and gas deposits, and the presence of pressure with them in the reservoir beneath; the tremendous value of this pressure, whenever it is placed under proper control, in the recovery of the oil and the inestimable harm that can grow out of its wastage;

Third: The desire of the individual lessee to obtain through wells on his lease and to keep all that he can get of the oil and gas beneath, when and

*Address before the Petroleum Division, American Institute of Mining and Metallurgical Engineers, New York, Feb. 19, 1931. Mr. German is the General Attorney for the Skelly Oil Co.

as fast as he may choose, without regard to the situation of his neighbors, and without regard to market conditions; which, less politely stated, may be termed human greed and

Fourth: Distrust.

Due particularly to the third and fourth of these conditions, widespread unit operation by agreement seems to be quite difficult, if not impossible, of accomplishment. And yet, an ordinary conception of right and wrong should satisfy everyone that each land proprietor in a pool is entitled to a fair proportionate part, and no more, of the recoverable reservoir content if at the same time he can be required to share on a like basis in the cost of its recovery.

The state is interested in two things, namely:

First: The conservation of the irreplaceable oil and gas deposits within its boundaries, and in their production without waste, either underground or surface, for the use and enjoyment of its inhabitants as and when needed by them, and this includes future generations. This interest is to be manifested by an exercise of the police power. There are two ways in which the citizens of the state may use and enjoy these substances. One consists in the profitable extraction thereof from the ground by landowners within the state whose lands are located in the oil and gas fields and their profitable sale, and the profitable refining of such of the oil so extracted as may be utilized in refineries located within the state; and the other is the use of the gas for domestic and industrial purposes and of the by-products of the oil in motor vehicles, and of both substances in various and sundry other ways by the inhabitants of the state. Thus the state is interested in the recovery of the maximum amount of these substances from each and every pool within its borders at a minimum of cost, and also that their production from time to time shall bear a reasonable relation to reasonable market demands.

Second: The state is equally interested in the protection of the several proprietors and their lessees of lands located within the oil pools within its boundaries against the extraction or the dissipation and waste by any one or more of them of a disproportionate part of the oil and gas within the reservoir and in the accomplishment of a fair and equitable distribution among all of them of the recoverable oil and gas therefrom. It is as much a part of the duty of the state thus to protect the several proprietors in a pool as it is to protect the general public in the conservation of these natural resources. This interest is also to be manifested by an exercise of the police power.

The courts have held that *in the absence of legislative restraint* the owner of land or his lessee may produce through his wells all of the oil and gas that he is able to extract from the reservoir beneath without regard to where in the reservoir he may draw from and that he becomes the absolute owner of all thereof that he reduces to possession. Until the legislature has provided that he shall not do so, his neighbors cannot enjoin him from so doing nor can they recover damages on account thereof. Their sole remedy against drainage is the development and operation of their lands. These are the holdings of the courts both in states which have adopted the rule of ownership in place and those which deny ownership in place. The effect of these rules is to encourage rather than retard practices which lead to confusion, wasteful haste, duplication of development and operation, undue dissipation of gas pressure and a volume of production in no sense related to market demands. They are the antitheses of conservation, both physical and economic; but the fault does not lie with the courts, for the same courts have conceded the legislative power to alter these rules. Furthermore, the same courts have gone further and announced another rule which we who are interested in unit operation will find very helpful. They have held that oil and gas while in the ground belong to the owner of the land in which for the time being they lie and that the title thereto remains in him so long as they remain in his land; they recognize the migratory and fugaceous character of these substances but concede that so long as they are positioned beneath the surface of the land of one owner they belong to such owner and not to anyone else, subject, it is true, to his loss of his title by no act of his own, without his consent and even without his knowledge, for they concede that whenever they escape and go into the land of another the title of the former owner disappears and becomes that of the landowner into whose land their new position has been taken.

This is helpful because when we go back of the time when production is first had in a field, we are enabled to visualize the original right of each landowner therein as compared with that of all others. For all practical purposes no migration occurs until by the hand of man the formation is punctured and production commenced. Before there is any disturbance of the location of these substances in the reservoir, that is, prior to the time when the first well is drilled and operated, each land proprietor stands as the owner of, or, to say the least of it, equitably entitled to that quantity of the oil and gas which lies beneath the surface of his land. If it is practicable by some method of testing wells drilled at selected sites, examination of sand cores, etc., to estimate within reasonable bounds, not at all with mathematical accuracy, the fertility of that portion of the producing formation which lies under the surface of the land of each proprietor, then it is possible to appraise quantitatively the rights of each to a distribution of the recovered oil and gas; or, there may be other standards for determining each man's fair part of what may be recovered. These are problems for the petroleum engineer. These suggestions anticipate unit operation with the inception of development; but, if it should come afterwards, the then existing underground status (by which all concerned would doubtless find themselves bound) might be ascertainable by similar methods.

The United States Supreme Court in the case of *Ohio Oil Co. vs. Indiana,* 177 U. S. 190, 44 L. ed. 729, decided in 1900, gave to us the guiding principle when it said that from the peculiar nature of the right of each surface proprietor in a field and the objects upon which it is to be exerted, *the legislative power can be manifested for the purpose of protecting all the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession.* It made this guiding rule clearer when in the case of *Walls vs. Midland Carbon Co.,* 254 U. S. 300, 65 L. ed. 276, it said that "before the event occurs, indeed, in prevention of it, the state may interpose its power to prevent a waste or a disproportionate use of either oil or gas by a particular owner in order to conserve the equal rights of other owners and advance the public interest," and stated that in the Ohio Oil Co. case it had been adjudged that the use by one owner of the surface affected the use of other owners and an excessive use of one diminished the use of others, and that

hence the power of the state can be manifested for the purpose of protecting all by securing a *just distribution* to arise from the enjoyment by them of their privilege to reduce to possession.

It has been said that "the ultimate aim of proration and of unit operation should be to recover for each leaseholder only that oil which originally underlay his property; that proration and unit operation will do away forever with legalized piracy which says that the oil belongs to the man that reduces it to possession." Proration is a helpful remedy; but unit operation is a cure, for it can more nearly attain a fair distribution as well as prevent underground waste.

Some states have passed oil and gas conservation laws. These are usually directed primarily against waste in the interest of the general public. Some of them are also aimed directly at the safeguarding of individual rights. Great progress has been made in recent years in the science of recovering, and that of conserving, oil and gas, *including the discovery of the inestimable value of a properly controlled use of reservoir pressure in the recovery of oil.* This discovery places a finger squarely on the reason for so much economic and underground waste. It furnishes a basis for an extension of the exercise of the legislative power to points further than it has ever gone, or, perhaps, in the case of some states, for the exercise by administrative agencies under existing laws of authority not previously undertaken. If proper use is made of this discovery, then the public and the producer are equally protected.

While the state cannot compel a merger of titles, it seems to me to follow clearly from the decisions of the United States Supreme Court already referred to and other cases presently to be reviewed, that the state has the power to require unit operation.

Proration has been sustained as constitutionally valid in Oklahoma by its Supreme Court (292 Pac. 841) and in an unreported opinion by a three-judge Federal court; by the Supreme Court of California (294 Pac. 717) and by the District Court of Travis County, Texas. The decisions in these cases are in point, but other decisions bear more directly upon compulsory unit operation.

In the first place, each proprietor's constitutional right to enjoy his own property is satisfied when he is duly delivered his share of the production wholly without regard to whether this production comes out of the ground through wells drilled on his own land or those drilled on the lands of others. If the oil and gas in the ground is not a common fund analogous to accidentally confused goods (12 Corpus Juris 492), but is owned in place, still, since they are migratory and when the pool is operated easily become confused, the rule governing accidental confusion of goods—that each is at least entitled to his aliquot part of the whole—is fairly applicable here. Each owner should, of course, in any event, be required to pay the cost of the recovery of his part.

A case directly in point here is that of *Marrs vs. City of Oxford,* decided in 1928 by the United States District Court in Kansas, and reported in 24 Fed. (2nd) 541, and decided on appeal by the United States Circuit Court of Appeals for the Eighth Circuit, whose opinion is reported in 32 Fed. (2nd) 134. An oil field encroached upon the city of Oxford, Kansas, and was proved to underlie a considerable part of the residential portion of the city. The city council passed an ordinance prohibiting the drilling of more than one well in a city block regardless of the fact that it was known that there were many separate land proprietors therein. A permit for the drilling of such well was required to be obtained and the ordinance provided that all of the several proprietors or their lessees in each block should have the privilege of enjoying shares in the production from the one well which was allowed to be drilled, upon payment of their respective proportionate parts of the cost and expense attending the drilling and operation thereof; and it provided that one-eighth of the production should be divided among the lessors of the leased lots without regard to cost and expense. A lot owner who had not leased his lot in a block in which a permit to drill a well had been granted to the lessee of another lot; a lessor of another lessee in the same block, and the last-mentioned lessee, filed suits in the United States Court in Kansas, attacking the validity of this ordinance on the ground that it deprived them of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Their contentions were denied and the ordinance was sustained by both the trial court and the Circuit Court of Appeals.

It is obvious that in effect the provisions of said ordinance enforced the unit operation of each city block. Although there were several lot owners, but one well could be drilled within the block, and for the drilling thereof a permit had to be obtained, and, upon fair conditions relating to the costs, the owners of all of the other lots and/or their lessees, could and were to be allowed to share in the production from the one well. The distinction between this plan, on the one hand, and the unit operation by agreement of a like area, on the other, is that in the case of the ordinance there is no absolute obligation to pay any part of the cost of drilling the well, and the right to share in the production is made contingent upon actually sharing in the costs; whereas, in the case of agreed unit operation there is an absolute obligation to pay a prescribed share of the cost of development and operation, and also an absolute right to share in the production upon a prescribed basis. In the former, both landowners and their lessees were bound, for it was a police regulation, whereas, in the latter, if the royalty owners have not also agreed, they are not bound.

Having in mind the provisions of said ordinance, let us take particular note of what the United States Circuit Court of Appeals said about it. That court, after having sustained the validity of the ordinance upon the ground that it tended to protect the health and comfort of the residents of the city and their property from fire hazards, proceeded to add:

"But looking to the substance of things, as equity does, what are the rights of plaintiffs that will be encroached upon or denied to them by the enforcement of this ordinance? It is not the mere right to drill a well on one or two lots at great cost and stop with that, or to take the proportionate part of the oil and gas in the pool that might be said to lie under or be fairly attributed to those lots. The obvious purpose was to reach the pool as quickly as possible and take all of the oil and gas obtainable before others could get it, thus seriously encroaching upon and probably destroying the same rights of adjoining lot owners. If one or more lot owners have given a lease for which no permit is obtainable their lessee may join a lessee who has a permit in the same block on terms that are fair to both lessor and lessee. If a lot owner has not given a lease he is protected by the asking in a fair proportion of the mineral produced by a permittee. The regulations make every effort to protect, rather than to destroy rights. They extend equal opportunity to all who have an interest and eliminate the race between those having equal rights in a common source of wealth, so that some may not take all and leave others with nothing. Under the law in Kansas there is no property in oil and gas, because of their migratory nature, until they have been captured, though each surface owner may take without limit, unless lawfully restrained. Phillips v. Springfield Crude

Oil Co., 76 Kan. 783, 92 P. 1119; National Supply Co. v. McLeod, 116 Kan. 477, 227 P. 350. This is the rule also in Pennsylvania and Indiana. The nature of this right was fully discussed and defined in Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. The court in that case, after accepting the general practice as a settled principle, that every owner of the surface within a gas or oil field might prosecute his efforts and reduce to his possession if possible all of the deposits without violating the rights of other surface owners, in the absence of regulations to the contrary, said:

"'But there is a co-equal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.'

"If this right in each and all of the surface owners can be thus restrained and its exercise regulated by a law of the state enacted for the purpose, how can it be held that a valid police regulation, which incidentally and in caution embodies the same restraint and regulation, can be made the basis of a claim that plaintiffs have a right to take all of it, and any restraint of that right violates constitutional guaranties? The basis of a statute, sugested in the Indiana case, is the governmental power to equally protect each surface owner in his right to a common fund."

Thus we see that what is in effect, if not in reality, an enforced unit operation of a city block has been sustained not only upon the ground that it protected the health and comfort of the inhabitants of the city and diminished the fire hazard to their property, but also upon the added ground that by the recovery through one well in a block of oil for all of the several lot-owners within it, none was deprived of any constitutional right to drill upon his own property and to produce his oil through his own well, since each was extended the opportunity upon fair terms, to receive, by the asking, a fair share of the production; and the plan eliminated the costly race between those having equal rights.

The United States Supreme Court denied a petition for a writ of certiorari to bring the case there for its review, and thus by indirection announced that it found no serious fault, if any at all, with the decision below.

If such a system for the development and operation of a city block, an enforced unit operation thereof, wherein there are a large number of separate lot-owners, does not deprive any lot-owner of any constitutional right, then why may not a system for the unit operation of an area greater than the size of a city block, such as one or more sections of land or the whole of an oil field, be lawfully adopted and enforced? The only difference between the two lies in the territorial extent of the application of the same principle of regulation.

Neither District Judge (now Circuit Judge) McDermott nor Circuit Judge Lewis founded his sustenance of the constitutional validity of the ordinance upon the sole ground that it protected to some extent the health, comfort and property of the inhabitants of the city of Oxford. They each, and particularly Judge McDermott, spoke of the economic waste in the drilling of unnecessary wells which was prevented by the ordinance; and both of them regarded the plan as coming within the holding in the *Ohio Oil Co.* case with reference to the power of the legislature to accomplish proportionality of taking from a pool. So it cannot in my judgment be reasonably or successfully contended that the courts would not have sustained the ordinance had it not been for the presence of homes and families within the area affected by it. Nothing is made clearer than that if the same town-lot situation had existed anywhere else, and had been unaccompanied by the presence of persons or residences, a regulation like that which the ordinance contained, relating to the development of the area, would have been sustained upon the same principle which lay at the foundation of the announcement in the *Ohio Oil Co.* case. If an equal opportunity, such as the Oxford ordinance afforded to every lot owner should be extended to all the leaseholders within an entire oil field to receive, upon fair terms as to the expense, an interest in the production from prescribed and allowed wells in the field upon a basis of a fair apportionment of the production and at the same time there should be eliminated the race between those having equal rights in the common source of wealth so that some may not take all and leave others with nothing or less than their share, who can say, in the light of this decision, that such a program applied to the field as a whole would operate to take from any leaseholder therein any of his constitutional rights? Let it be left to others to pass upon the practical wisdom of compelling such a complete pooling of a large oil field. There are operators in the Oklahoma City field who have almost prayed for some way to stop the waste of gas energy.

We have another interesting case. It arose in Texas. The commonly called 150-foot rule issued by the Railroad Commission of that state and its enforcement is a step in the direction of a requirement of unit operation. The Texas statute provides that the Railroad Commission "is empowered to establish rules and regulations for the drilling of wells and preserving a record thereof" and makes it the duty of the Commission "to require such wells to be drilled in such a manner as to prevent injury to the adjoining property." The rule promulgated by the Commission provides that no well for oil or gas shall be drilled nearer than 300 feet to any other completed or drilling well on the same or an adjoining tract of land and that no well shall be drilled nearer than 150 feet to any property line, but it contains a proviso to the effect that the Commission, in order to prevent waste or to protect vested rights, may grant exceptions and permit drilling within shorter distances. The validity of this regulation and of a special order issued under the proviso were assailed in the case of *Oxford Oil Co. vs. Atlantic Oil & Producing Co.* (D. C. F. D. Tex.) 16 Fed. (2nd) 639; (C. C. A. 5) 22 Fed. (2nd) 597. The Oxford Oil Co. owned an oil lease on a strip of ground 3,160 feet long, 56 feet wide at one end and 36 feet wide at the other, in the heart of a prolific oil field in Texas. It had planned to drill ten wells on this narrow strip. They would have been about 300 feet apart and within about 25 feet of adjoining large tracts held under lease by others. By an order the Commission limited the Oxford company to the drilling of four wells and specified where they must be located. By the order these wells were not evenly spaced; the first was 150 feet south of the north line of the 3,160-foot tract, the second 913 feet south of the first, the third 157 feet south of the second, and the fourth 906 feet south of the third, and this left 1,064 feet between the fourth well and the south line of the tract. The wells were drilled accordingly, and operated, and then the company sued the Atlantic Oil & Producing Co. and the members of the

Commission and others for damages, claiming that it had been deprived of its right to drill wells on its leased land and thus was deprived of its property in violation of the Fourteenth Amendment to the Constitution of the United States. The Atlantic Oil & Producing Co. owned, developed and operated the adjoining large lease on one side and another company was likewise situated on the other side. Their wells were 160 feet from property lines and did not match the Oxford company's wells. The Atlantic company had some part in procuring the special order on the Oxford company. Judge Atwell, in deciding the case in the trial court, stated that an oil well will drain lands around it for 150 feet in every direction, and that the Oxford Oil Co. could not drill any well on their strip of land without draining the contiguous land, and that "if allowed to drill unsupervised, they would not only get all of the oil that was under their own land, but they would secure a large amount of property that belonged to others. They could not drill any well without this result." The court sustained the regulation and the order made under it upon reason and upon the authority of the *Ohio Oil Co.* case and other cases. In concluding, Judge Atwell said:

"I am convinced that the plaintiff's rights have not been violated and that the drillings allowed by the Commission were consonant with the plaintiff's ownership, rights of development, and enjoyment, and the preservation of the property rights of neighboring and contiguous owners."

The Circuit Court of Appeals, in affirming this holding, said, among other things, that

"The right of a state to so regulate the drilling of wells for oil and gas as to conserve the rights of adjoining owners is too well-settled to admit of serious controversy. . . . It was within the power of the Legislature to lay down a general rule for the protection of the mineral rights of the owners of adjoining lands, and to leave the details of enforcing that rule to an administrative agency or board."

The United States Supreme Court refused to grant a writ of certiorari in that case. The decision in this case is particularly significant for two reasons: *First,* a fair distribution of the recoverable oil in the area of the lease among the holders of leases therein was the one and sole purpose of the order. No waste above or under the ground was involved; and, *second,* Texas is one of the few states wherein the courts have held that the owner of land owns the oil and gas in place. Through the allowed wells, the Oxford company would draw oil from its neighbors, and through their wells, its neighbors would draw oil from certain unprotected parts of the Oxford company's strip. Judge Atwell mentioned the fact that under the decisions of the Texas courts the landowner owns the oil and gas in place, and held that if the difference between the rule in that state and the opposite rule on that subject in Indiana (whose statute was involved in the Ohio Oil Co. decision) has any bearing upon the problem under discussion "it tends to add a stiffening to the reason for sustaining the Texas regulation as a proper exercise of its police power." He clearly meant that the regulation and the particular order tended to accomplish proportionality of taking, and that if thereby the Oxford company acquired, under the circumstances, an amount of oil equal to that in place under its land, it was immaterial where in the reservoir it came from.

If the power exists, and particularly in a state where, as in Texas, the owner of real property owns the oil and gas in place, to require a particular location or spacing of wells in a small, limited portion of the area of a large oil field in order to accomplish a fair distribution of the production among a few producers in such limited area, then it necessarily follows that, for the same reasons and upon the same grounds, the power exists (and if circumstances require, it may be exercised) to regulate the spacing and location of wells throughout the entirety of any such field in order to accomplish a fair distribution among all of the producers therein. If the Legislature, or an administrative body acting under its authority, has the power to regulate the spacing of wells of one operator for the protection of his neighbors, it would seem necessarily to follow that it has the power to regulate in like manner all the other operators in the field in carrying out a comprehensive plan of conservation and of fair distribution of the reservoir content among them all.

It will not do to say that if the property boundary lines in a field happen to be so regularly fixed as that wells would be located in accordance with the prevailing practice of the industry, that is, one well to each ten acres, and that if the field were developed according to custom, no well being nearer to a property line than 300 feet, the power of regulation would not exist. There nevertheless would still obtain the competitive struggle, confusion, wasteful haste, and undue dissipation of gas energy. In the absence of either voluntary or enforced orderly and regulated operation of the field, no fair distribution among the several leaseholders of the recoverable oil from the reservoir would be possible. The race for advantage would still obtain. There would be disproportionate takings and disproportionate and unfair use made of the commonly-owned gas energy.

I have not been able to study sufficiently the gas-oil ratio statute of California, nor the decisions of the courts of that state (294 Pac. 717) sustaining its constitutional validity, to make it safe to review them. Petroleum engineers will, I think, give credit to that state and its courts for having made the first substantial legislative and judicial direct recognition of the presence of gas energy in subsurface oil zones and its importance in the recovery of the oil, and as the first to take affirmative steps to prevent the waste and to require the utilization of this energy. The Oklahoma Corporation Commission and perhaps the Texas Railroad Commission have recognized this to some extent in proration orders. If a state can require what the California statute does, then there appears no good reason why it could not require the conservation and use of this energy by a type of development and operation such as is the subject of discussion in this paper.

The principle underlying the *Ohio Oil Co.* case and kindred decisions is not new. It is older than our Government. It is embodied in the ancient maxim of the common law that everyone must so use his own property as not to injure the rights of others, which lies at the base of a proper exercise of the police power. It happens that this principle has been but recently applied to conditions in this comparatively young and now rapidly growing industry.

Many years ago it was stated by the courts that the Government has the power to prescribe regulations for the better and more economical management of property *of persons whose properties adjoin,* or which, for some other reason, can be better managed or improved by some joint operation. This early announcement was quoted by the United States Supreme Court in *Wurts vs. Hoagland,* 114 U. S. 606, 29 L. ed. 229. It was long ago held by courts, as is shown by quotations in the *Wurts* case, that where there are *adjoining lands held by various owners in severalty* and which, *by reason of the peculiar natural condition* of the whole tract,

cannot be improved or enjoyed by any of them without the concurrence of all, there is presented a condition where the power of the legislature may be exerted to establish regulations whereby all may be compelled to submit to proceedings whereby they may be improved or enjoyed, and to contribute, in proportion to the benefits enjoyed by each, to the expense of the steps taken to accomplish such improvement or enjoyment.

This principle has been applied in drainage cases where there are several owners of land located in an area which is subject to overflows or wherein swamps exist, and, as a result, the establishment of drains is necessary to the better enjoyment by the several owners of their respective tracts within the area. It has long been applied to party walls, partition fences and other conditions. Its application to a variety of situations furnishes to us something which the Supreme Court did not suggest in the *Ohio Oil Co.* case as a means for accomplishment of an enforced fair and equitable distribution of the oil and gas reservoir content among the several proprietors whose lands lie within the pool.

The establishment of drainage districts by or under the legislative authority is an exercise of the police power of the state. While drains cannot be provided for purely private purposes, the public benefit required need not be a use or benefit accruing to the whole public or any large portion of it, and if the public purpose is kept in view, the fact that private interests will also be promoted is immaterial. Statutes authorizing the reclamation of swamp or agricultural lands by drainage are held to be valid independently of any effects upon the public health, if they tend to the general advantage or prosperity of the community. (19 C. J. 610.) The power to construct drains is a special authority given for a particular purpose and may be conferred upon any person or body upon which the legislature may see fit to confer it. (19 C. J. 611.) A reclamation statute creating reclamation districts and providing that those who are interested in the land and must pay for the improvements shall determine by an election whether the improvement shall be made, was sustained in California. (48 Pac. 1016.) The Indiana Supreme Court held (99 N. E. 742) that public ditches, like public highways, are subjects of the state's control, and it may delegate to interested persons the power of initiative and declare the extent of jurisdiction.

In *Wurts* v. *Hoagland*, cited above, an attack was made upon an act of the Legislature of New Jersey which provided for the establishment of drainage districts for the reclamation and improvement of swamp or overflowed lands. There were certain provisions of the law with reference to the payment of the expense of construction and maintenance of the system, one of which was that the cost and expense should be distributed and assessed to the several properties in proportion to the benefit derived by each from the drainage. A landowner in a drainage district established under this statute asserted that its operation deprived him of his property without due process of law. It requires no stretch of the imagination to look upon this statute as an enforced unitized drainage system. The state courts sustained the law. In reviewing the case on writ of error, the Supreme Court of the United States pointed out that laws authorizing drainage of tracts of swamp and lowlands by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the area benefited, had long existed in the state of New Jersey and in many other states,; and it quoted approvingly from an early decision of the New Jersey Supreme Court, this language:

> "Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government."

It quoted from another decision of the New Jersey court, wherein it was held that power exists in the local government to prescribe public regulations *for the better and more economical management of the property of persons whose property adjoins or which for some other reason can be better managed and improved by joint operation*, such as the power of regulating the building of party walls, the making and maintaining of partition fences and ditches, the construction of ditches and sewers for the draining of uplands and marshes, which can more advantageously be drained by a common sewer or ditch; *and that this is a well-known legislative power, recognized and treated by all the courts and writers upon* law throughout the civilized world; a branch of legislative power exercised both before and since the Revolution and before and since the adoption of the present Constitution, and repeatedly recognized by the courts of New Jersey. In that case, the New Jersey court is quoted as having held that the principle of all these laws is to make an improvement common to all concerned and at the expense of all; that in none of the works established under such laws is the owner divested of his fee, and for all purposes the title of the land remained in the owner. The Supreme Court, after having reviewed these and other cases, then said:

> "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and lowlands upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural conditions of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."

Numerous cases sustaining the same principle might be cited.

The analogy between the drainage cases and a requirement for the unit operation of oil pools seems to be clear. In the former, by reason of the peculiar natural conditions, the whole area cannot be improved or enjoyed to its full extent without the concurrence of all, and since all will not concur, they may be compelled to conform to a plan best calculated, on the whole, to secure and promote both the common interest of all and the individual interest of each of them. This same thing is manifestly true in the case of the oil pool. Oil and its accompanying gas are migratory and fugacious and will pass from the land of one proprietor to that of another, so that one, either by waste or a disproportionate use thereof, has it in his power to seriously injure the others and even to annihilate the rights of the others, and hence, each may be compelled to yield, not his title, but some control and dominion in the interest of the common good of all. By reason of the peculiar nature of these substances and the peculiar natural conditions, the rights of the several proprietors in the oil pool to take from the common source of supply cannot all be protected

(in the absence of the concurrence of all) unless the state, in the exercise of its legislative power, secures a just distribution among all to arise from the enjoyment by all of their privilege to reduce to possession. The soundness of these statements, which are but paraphrases of the statements in the *Ohio Oil Co.* case, is greatly strengthened by the recent discovery of gas energy in oil pools and its function in the recovery of oil. Such an oil statute would be founded and predicated upon the same principle upon which the drainage acts are predicated. It would not be something new in the law, but only a new application of an old and well-settled principle. These references to laws relating to drainage districts suggest that the legislature of a state might authorize the creation of oil and gas conservation districts, with power in the owners of leases upon lands within an oil field or an area which may be thought to be underlaid with oil or gas, to organize such a district to be operated on the unit plan; all with the view to accomplishing two purposes—*first,* the prevention of the waste of oil and/or gas in the area for the general benefit of the public at large and to conserve it for use as and when needed by the public, and, *second,* to bring about a fair distribution of the content of the reservoir among the several land proprietors and to protect each against the extraction by any of a disproportionate part thereof.

In practice it would doubtless be almost universally true that the owners of leases upon a considerable portion of the acreage would agree to the unitization of their lands and would be in a position to vote or petition for the establishment of an oil conservation district to be operated with a view to accomplishing the purposes above enumerated, and thereby force into the plan those unwilling to join it. Having been established pursuant to legislative enactment, royalty owners would be likewise bound. The area of the pool might, and doubtless, in most instances, would be unknown at the beginning of development; but it could be approximated. A particular area could be originally brought into the plan with the understanding that as development progressed, its boundaries could be extended; and, if land brought in proved to be outside the pool, it could be later excluded. We find that in the case of drainage districts it is not an uncommon thing for lands which are brought in to be later excluded because found not to be benefited, and, also, that lands are often added or annexed to the district which it is later discovered will be benefited by it. (*Hauck* v. *Little River Drainage District,* 239 U. S. 254, 60 L. ed. 266; 19 C. J. 621-622.)

Is the saving to the producers in cost of recovery a meritorious consideration from a legal standpoint? The answer must be in the affirmative. The police power of the state is not limited to measures for the protection of the health, safety and comfort of its citizens. It extends also to the promotion of general prosperity, a fact referred to in strong terms by the California Supreme Court in the gas-oil ratio case. (294 Pac. 717.) The Idaho sheep-herding statute was sustained upon the ground that it promoted the prosperity and general welfare of the state and its inhabitants. (*Bacon* v. *Walker,* 200 U. S. 561.) In the *City of Oxford* case, the trial court, speaking through Judge McDermott, who later became a Circuit Judge in the newly created Tenth Circuit Court of Appeals, made a particular point here. He said:

> "Without any attempt to define police power, it is sufficient to say that the police power is not limited to the protection of the health, peace and morals of the community. It has been said to extend to acts that 'increase the industries of the state, develop its resources, and add to its wealth and prosperity' (Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. ed. 923), and to 'promote the public convenience and the general prosperity' (C. B. & Q. Ry. v. People, 200 U. S. 561, 26 S. Ct. 341, 50 L. ed. 596, 4 Ann. Cas. 1175)."

Referring to zoning ordinances, and particularly to the ordinance involved in the case of *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, Judge McDermott said that

> "The ordinance was sustained on the broad ground that one can be compelled by law to use his own as not to injure another."

Later, he said that

> "The argument most generally used in support of zoning ordinances is that of the stabilization of property values, and giving some assurance to the public that, if property is purchased in a residential district, its value as such will be preserved, is probably the most cogent reason back of zoning ordinances. That reason exists in the case at bar. An ordinance which affords some protection to the public generally from the waste of town lot drilling, and gives some assurance to owners of real estate that the oil under their property may be economically recovered, is within the police power. An ordinance that makes it impossible for a diligent or fortunate lot owner to drain the oil from his neighbor's lots, to his own exclusive use; an ordinance which makes it impossible for an owner of property in a block to prevent any recovery of oil on other parts of the block—is valid."

We have the question as to whether the imposition by a legislature of such a regulation as we are discussing would constitute an unreasonable restraint. One limitation upon the police power is that the regulation must not be unreasonable or arbitrary; otherwise, the courts will strike it down as a taking of property. It therefore becomes necessary that we make sure of the soundness of our position from a fact standpoint. However, in the *Ohio Oil Co.* case, that company was unable to profitably operate its oil wells unless it were allowed to produce at the same time the gas, and, it had no market for the gas. The court nevertheless sustained the law prohibiting a waste of the gas. The case of *Walls* v. *Midland Carbon Co.,* 254 U. S. 300, 65 L. ed. 276, presents a still stronger case which those who are interested may desire to read. In the California case, the operation of a certain well was enjoined until more efficient methods should be employed to conserve the gas. (294 Pac. 717, 726.)

In the Texas 150-foot-rule case there was a limitation placed upon the otherwise existing right to drill as many wells as the lease-owner desired, and, while the reasonableness of the order was not raised in the suit, yet the court took account of the area from which the lease-owner would draw oil through its wells, and although it was not at all apparent that the particular number of wells allowed to be drilled, when considered in connection with the wells on adjoining lands, enabled each lease-holder in the particular area to extract from the reservoir its fair share based upon any sort of mathematical calculation, yet, the court dealt to no small extent with the reasonableness of the limitation on the Oxford Oil Company under the circumstances. Surely, if the Texas order, which so far failed of perfection, was not unreasonable or arbitrary, a regulation which more nearly approaches a distribution among the surface owners upon a basis which, by mathematical calculation, is approximately fair, could not be said to be unreasonable or arbitrary. The same thing may be said of the *City of Oxford,* Kansas, case. But, the point is that any enforced unit operation plan must not be unreasonable; otherwise, it will be void.

The police power, if exercised, can close the door

to the desire of your neighbor to gain possession of your oil and gas deposits. It can remove from your neighbor his fear that you will gain possession of his. The police power, if exercised, can dispense with the prevailing wasteful cost of capturing these substances. It can dispense with the practice of skimming the cream off of flush fields and leaving the bulk of the deposits to be possessed only at such high cost that much of it which could have been will never be recovered at all. It can, if it will, compel a cessation of the practice of committing underground waste. It can, if it will, adjust output to market demand and thus let the tankage of excess supplies rest where they should in Nature's costless, wasteless and perfect warehouse. In times both of over-production and under-production, it can secure to lessees generally a realization of a fair ultimate profit on their estates, and to lessors generally a more protracted and satisfying reasonable income, while insuring the public at large a greater certainty of supply to meet its daily needs over an extended period of time, and thus promote the happiness, comfort and prosperity of the people.

American Judicature Society Devotes Session to Judicial Selection and Tenure

THE annual meeting of the American Judicature Society was held in Washington on May 6. Aside from formal matters and the election of officers there was a discussion of the subject of judicial selection and tenure, the first session, probably, ever devoted exclusively to this subject by any body of lawyers. The meeting was followed by a dinner.

At the afternoon session announcement was made that the Judicature Society had accepted the proposal of the National Municipal League to sponsor jointly a national committee for the study of judicial selection in the most thorough manner possible. The Law Institute of Johns Hopkins University has also been invited to join.

Interest in the subject was evidenced in the discussions of the meeting. It was made to appear very plainly that the problems of judicial selection are very much to the front in professional thinking. In our larger cities there is a crying need for lifting judicial politics to a higher plane. Mr. Charles A. Beardsley led the discussion with a description of a plan of appointing judges by the governor subject to confirmation by the voters which has been proposed by the Commonwealth Club of California and approved by the California State Bar.

Mr. Frank T. Boesel told how the non-partisan tradition existing in Wisconsin for several generations had lately been broken by the present dominant political faction. Mr. Frank W. Grinnell told at some length of the precise operation of the appointment system in Massachusetts. The Maryland system was explained by Mr. E. W. Young, and in this state, as well as in various others, it appeared that the elective plan had been in large part superseded by appointment owing to the fact that most vacancies occur between elections. Appointments to the short term, made by governors, fill often more than half of the judicial places, and the part taken by the electorate is to confirm or reject appointed judges, just as is proposed in California.

Mr. Walker B. Spencer told how the bar of Louisiana submitted to the constitutional convention a few years ago a plan which provided a judicial council with large administrative powers which would nominate candidates for the bench, to be appointed by the governor and confirmed by the senate. After a term of ten or twelve years their names were to be submitted to the voters to pass upon their continuance in office, but without competition on the ballot. That plan lacked but one vote of being accepted by the convention.

Chief Justice Christianson, of North Dakota, told of non-partisan primaries and elections in his state, where the integrated state bar finds its candidates invariably selected, and they represent the minority as well as the majority political party.

Chief Justice Marshall of Ohio told of the need for a compilation of data concerning the many systems actually in use in choosing judges and his motion, directing the secretary to obtain this information, was adopted.

The speaker, following the dinner, was the Hon. John Lord O'Brian, assistant to the attorney general, who made a most interesting and telling speech. After giving an historical sketch of the office of attorney general and the Department of Justice he presented a broad survey of the legal profession at the present time and dwelt upon the public aspects of the profession and the joint responsibilities to government of all lawyers. That the bar is the traditional conservator of all liberal rights he set forth very clearly and referred to the growing consciousness of this principle on the part of lawyers and the rapid progress being made in integrating the bars of the states and in carrying out the larger policies long advocated by leaders of the profession through the medium of the American Judicature Society and the various bar associations. Mr. O'Brian's sincerity and magnetism enabled him to present a most encouraging view of the present trend toward a more inclusive, more responsible and more ambitious bar.

The new directors elected are as follows: Henry Upson Sims, Alabama; Charles A. Beardsley, California; Hugh M. Morris, Delaware; R. Franklin White, Louisiana; Arthur Vanderbilt, New Jersey; George H. Bond, Grenville Clark, and Robert H. Jackson, New York; Robert A. Taft, Ohio; David A. Simmons, Texas; James H. Corbitt, Virginia; Frank E. Boesel, Wisconsin. The directors elected the Hon. Newton D. Baker president, Judge Clarence N. Goodwin chairman of the board, and Herbert Harley, secretary-treasurer, to succeed themselves. The following were elected vice-president: Henry M. Bates of Michigan, James R. Keaton of Oklahoma, Rufus C. Harris of Louisiana, Philip J. Wickser of New York, and John H. Wigmore of Illinois.

The Society will co-operate with the Conference of Bar Association Delegates in giving a dinner at Atlantic City on the evening of September fifteenth.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LAW and Literature and Other Essays and Addresses, by Benjamin N. Cardozo, Chief Judge of the Court of Appeals of New York. 1931. New York: Harcourt, Brace and Company. Pp. 190.

No one is better qualified to discourse on law and literature than Judge Cardozo for no one has done more than he has to show how happy and intimate may be their alliance. The grateful readers of those admirable works "The Nature of the Judicial Process" and "Paradoxes of Legal Science" know well the literary charm with which he contrives to invest the most arid topics of the law with human interest. These seven papers now collected under the appropriate title borrowed from the first of them bear testimony once more not only to his range of legal scholarship but also to those gifts of ready metaphor and apt allusion, of gentle irony and whimsical wit which lend felicity to all that he writes. *"Ornari res ipsa negat,"* said Jefferson once of an intractable legal subject on which he was called upon to prepare a disquisition. Judge Cardozo would never have said this.

The particular form of legal writing which is here discussed from the literary point of view is the judicial opinion. Ought it to be literature as well as law? Should it be artistic as well as sound? There are some who hold that aesthetic considerations are entirely irrelevant to the composition of a judicial pronouncement, whose appeal should be solely to the reason and not at all to the emotions. If they mean that an opinion is no fit place for the display of literary arts and graces, Judge Cardozo would probably agree with them. But if they mean that a judgment ought never to be in itself a thing of beauty and distinction, he would at once join issue. In these pages he effectually demolishes such heresy. The truth is that a judicial opinion properly conceived is the product of an art, not of a mechanical process. As such it should satisfy the canons of art as well as of utility.

What then constitutes literary excellence in a judgment of the Court? Judge Cardozo classifies and analyses the various styles which he finds exemplified in the Law Reports and displays their merits or defects with penetrating acumen. It is a difficult medium in which to excel and the scope permitted in this form of composition is rigidly confined but Judge Cardozo easily establishes his thesis by well-chosen citations from such masters as Lord Mansfield, Lord Bowen, Lord Blackburn, and Lord Bramwell in the English Courts and Chief Justice Marshall and Mr. Justice Holmes of the United States Supreme Court. By way of contrast he refers to the scissors and paste type of judicial style on whose horrors he refrains from expatiating: "They are known but too well. The dreary succession of quotations closes with a brief paragraph expressing a firm conviction that judgment for plaintiff or for defendant, as the case may be, follows as an inevitable conclusion. The writer, having delivered himself of this expression of a perfect faith, commits the product of his hand to the files of the Court and the judgment of the ages with all the pride of authorship. I am happy to be able to report that this type is slowly but steadily disappearing."

Literary style is not merely an adventitious ornament in a judicial opinion. Elsewhere in the graceful tribute included in the commemorative volume published on the ninetieth birthday of Mr. Justice Holmes, Judge Cardozo reminds us that "the judge with a sense of style will balk at inaccurate and slipshod thought. Style is thus a form of honor and courage, just as, Santayana tells us, is the pursuit of truth always." Thus, as ever, form and substance are found to be inseparable and to interact one upon the other. Moreover, it is important that the judgments of the Court should not only be right but should seem to be right. Judge Cardozo quotes Lord Nottingham's famous adjuration: "Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad." A judgment should be convincing but conviction is only secured by persuasion and persuasion is an intellectual art.

There is so much that is provocative of thought and comment in the first of these papers that one is tempted to linger over it. But the others are not less attractive and suggestive. In "A Ministry of Justice" Judge Cardozo deals with a subject which much engaged the interest of the late Lord Haldane and is dealt with in the Report of the Committee on the Machinery of Government over which he presided. How often in judgments the Court is heard to say: "We are here to administer the law as it is, not as it should be" and to point out that the remedy for the seeming injustice of the decision must be sought from the Legislature. These judicial admonitions, alas, seem seldom to reach their destination or if they do too often fall upon deaf or preoccupied ears. What Judge Cardozo desires is that constitutional means should be provided whereby the periodical revision of the law may be secured and the defects which the Courts have brought to light remedied. Everyone knows of a hundred and one irritating and useless snags which persist in practice because the removal of them cannot be got to engage the attention of the politician who either has not time to consider them or does not see any votes to be gained. Judge Cardozo would have a department instituted whose duty it should be to attend to such matters. The project deserves the consideration of all reformers.

The third and longest article is devoted to "What

Medicine Can Do for the Law" and is a plea for fuller and more sympathetic collaboration between the two professions particularly in the domain of penology. This is delicate ground and Judge Cardozo treads it delicately, but firmly. In the remaining papers he returns to his own domain and in his addresses on "The Home of the Law," delivered at the dedication of the beautiful new quarters of the New York County Lawyers' Association a year ago, "The Game of the Law," delivered at the 74th commencement of the Albany Law School, and "The Comradeship of the Bar," delivered before the New York University Law School Alumni Association, the note is struck with varying harmonies of that devotion to the law and its service which has been the inspiration of Judge Cardozo's life work and with which he has done so much to inspire us all.

MACMILLAN.

Westminster, England.

Mr. Miller of "The Times," by F. Fraser Bond. 1930. New York: Charles Scribner's Sons. Pp. x, 264.—Charles Ransom Miller, for many years editor in chief of the New York Times, took his calling with deep seriousness, striving, according to his lights, to interpret events and trends of thought in a manner helpful to his public and to humanity at large. He was a scholar self taught, since both in preparatory school and in Dartmouth he was the despair of his instructors. Throughout his busy life it was reading that in his case made the full man. He was trained professionally in a school where high principles were maintained and where fearless advocacy of right, if unpopular, causes was the rule. For he began his journalistic career under Samuel Bowles the second, of the Springfield Republican. While still in his twenties he went to the New York Times, then the property of George Jones, becoming its editor at the age of thirty-four.

When Adolph Ochs rescued the Times from the depths of financial failure into which it sank after the death of Jones, despite Miller's struggles against an accumulation of untoward circumstances, Ochs, with his invaluable gift of choosing the right men for the right places, retained Miller as his editor. Miller abundantly justified the trust and the close friendship bestowed upon him by the great publisher. The success of the Times brought wealth to Miller who, after Ochs, was its principal stockholder. In taking over the newspaper in its darkest hour Ochs doubtless was aware that its most valuable asset was its honorable reputation for distinguished public service, as in its exposure of the Tweed ring. With that reputation to build upon the two men of genius and integrity, Ochs and Miller, rapidly advanced the Times to the enviable position which it holds today. This is the simple but inspiring story which Mr. Bond tells in a satisfying way.

In the hands of Miller, who from his boyhood had sought to achieve a vigorous and flexible style in writing, the newspaper editorial was an effective instrument. It expressed the views of a man of wide knowledge who kept abreast of events and whose analytical mind, aided by exceptional sources of information, made him a rare interpreter of occurrences at home and abroad. An intimate friend and confidant of Cleveland, McKinley, Roosevelt and Taft during their respective terms in the White House, he was in a position accurately to reflect in his editorials opinions held by them and also to define their purposes. Though he gave consistent support to President Wilson, he shared the experience of others who labored at the exacting Wilsonian mill in receiving chill aloofness as his reward.

Self-respecting members of his profession remember Miller with gratitude for his famous defense before an investigating committee of the federal senate of the right of newspapers to call their souls their own. He pointed out that the committee's inquisitorial methods, if persisted in, would have a marked tendency to reduce the press of the United States to the contemptible position of the press in certain European countries "that crawls on its belly every day to government officials to receive its orders." And he reminded the committee that a newspaper faced daily the great and critical jury of its readers. Should it prove faithless, serving unworthy ends, it would suffer the greatest punishment that could possibly be inflicted upon it, the loss of all standing. That is a truth which many critics of newspapers fail to realize.

CHARLES H. DENNIS.

Chicago.

State and Federal Corrupt Practices Legislation, by Earl R. Sikes. 1928. Durham: Duke University Press. Pp. 294.—This volume is a useful review of the attempts to regulate the use of money in elections. There is extended comment on the legal interpretation of these laws, but little material on the practices actually prevailing in the various jurisdictions. The enumeration and classification of the several statutes and their judicial construction is of very great value, but a full knowledge of the situation would require much more intimate acquaintance with what is actually going on. In practice the compliance with these formal regulations is very remote from the statutory theory and requirement.

It is also important to analyze and appraise the usefulness of these provisions and to work out a constructive program in this important field—a task not, however, within the limits of the study outlined by Mr. Sikes.

The appendices of this volume are of value since they contain summaries of state laws and lists of cases in point, as well as a useful bibliography of discussions of such types of regulation.

The reader will find the volume a handy point of departure in the study of corrupt practices, and wish that Mr. Sikes or someone else might follow the subject through the mazes of actual practice and the arduous labor of constructing a positive program, more adequate to our present needs.

CHARLES E. MERRIAM.

University of Chicago.

Cases and Materials on the Law of Credit Transactions, by Wesley A. Sturges. 1930. St. Paul: West Publishing Co. Pp. xi, 1228.—The practicing lawyer is interested in the appearance of new teaching materials primarily as an aid to understanding and using the professional skills possessed by recent law school graduates. This excellent case-book by Professor Sturges of Yale is cleverly designed, and built, to develop one broad type of professional skill, namely, the giving of expert advice to creditors as to the use of credit and security devices. This emphasis upon the lawyer's role as business counselor, rather than as advocate, is in keeping not only with the subject matter of the book but also with the broader trend of professional practice. The book may properly be said to

represent the "functional approach" in legal education, in two senses—the chief function of the lawyer in relation to business activity, and the functions of various legal devices, rules and concepts as tools in attaining various desired business advantages. The practitioner may expect to find in any one of Professor Sturges' pupils a young man who knows where he is going, and how to get there.

The organization of the materials does not involve as radical a departure from previous legal categories as one might suppose. The first chapter, entitled "Accommodation Contracts" (pp. 1-288,) covers the ground of suretyship and guaranty, while the second, headed "Mortgages-Pledges-Conditional Sales" (pp. 289-735,) likewise covers ground previously staked off. Yet within these major divisions the materials are organized to present, not legal rules as judicial guides, but legal rules as helps or hindrances in choosing and in drafting credit and security instruments for various types of credit situations. The fundamental approach becomes most clearly manifested in the third chapter on "Dealers' financing by accommodation contracts, mortgages, pledges, conditional sales, and trust receipts" (pp. 736-872,) which is a masterly synthesis of the dealer's problems and of the dealer's banker's problems. ("Dealer" is used in a broad sense, including even a building contractor.) While remedial problems play in and out through the materials, the final chapter on remedies should equip the young practitioner to make good his choice of credit instrument.

The book is designed to train legal experts, but not experts in the ultra-legal problems of credit transactions. The selections in the book contain no discussions written from the standpoint of the economist or business expert. Through the facts of the (admirably chosen) judicial reports, the student gets disconnected glimpses of the business background. The only novelty in material is the abundant (perhaps too abundant) quotation of law review articles, notes and decisions. Even these, academic though they may seem, are consistent with the hard-boiled functional approach.

Professor Sturges has so consistently adhered to and so convincingly demonstrated the values of this approach, that it seems necessary to point out some implicit limitations. In the eyes of the creditor's legal expert the interests of other persons affected by credit transactions are merely facts which cannot be ignored in the reckoning of an enlightened self-interest. For instance, the dealer's guild and the banker's guild may well regard the judicial decisions, protecting the consumer-purchaser of an automobile against the claims of creditors under unknown conditional sales contracts or trust receipts (pp. 760-763,) as mere extraneous interferences with a clever security device. The judge belongs to another guild, one which employs, on some occasions, a set of postulates called "public policy," "social interest," or "justice," and one which enjoys, sometimes unfortunately, a monopoly of a certain kind of power. If one may infer his class discussions from his case-book, Professor Sturges' pupils will have to imbibe their ideas of social valuation (if any,) from other coures than the one on credit transactions.

EDWIN W. PATTERSON.
Columbia Law School.

The Criminal, the Judge and the Public: A Psychological Analysis, by Franz Alexander, M. D., Visiting Professor of Psychoanalysis in the University of Chicago; and Hugo Staub, Attorney-at-Law, Berlin. Translated from the German by Gregory Zilboorg, M. D., Bloomingdale Asylum, White Plains, New York. 1931. New York: The Macmillan Company. Pp. xvii, 238.—This work, published originally in Germany, and not unknown to criminologists, is a little different in its English garb from the German—this is inevitable, as the English language has not a terminology so fixed and specialized on the subject as the German.

In it, a physician and a lawyer attempt to use the psychoanalysis of the Freudian School to gain an understanding of the criminal personality; they hope their venture will be a stimulus toward the development of psychological criminology of advantage to legislator, medical expert and jurist—they rather hope that as the former Witch was a felon to be burned, and is now a hysteric to be treated, so the present criminal will bcome a patient for psychological treatment.

In a work on psychoanalysis we must expect the "Id," the "Super-Ego," "Narcissism," "Self-punishment Technic," and "Oedipus Complex" ("the cornerstone of human sexual development"), "Oedipus Conflict," "Crime," "Wishes," "Situation," etc. We are not to be astonished or even moved to learn that the sucking babe shows the "first drive to grasp, to dominate in the form of the cannibalistic possession of the breast of the mother, a sort of a partial eating-up of the mother"; or that the first decisive step toward adjustment to the outside world is when the infant imposes inhibitions on its own sphincter and stops defecating and urinating where, when and how it pleases, "sitting upon a chamberpot and feeling superior to grown-ups"—"sphincter morality" being the beginning and foundation of adult morality; or that Cain killed Abel because he hated Adam but it would not do to kill *him;* or that the surgeon is "activated by a set of unconscious sadistic trends," but does not notice his sadism on account of his helpfulness to mankind.

After such lessions, we are reconciled to words like "siblings."

Whatever may be the value of such a book in Germany, which, with all its militarism and science, is the home of sentimentalism, it can have no effect in English-speaking countries dominated by hard common sense.

And this largely from the fundamental misconceptions apparent from beginning to end that the Law is mainly concerned with the motive of an accused, and that the atonement principle is the dominating principle in punishment. We have pages on "motive," "dominating motive," "unconscious motive," "concious and unconscious motivation," etc.

The fact is that our Law in determinating criminality takes no account of motive-intent, a wholly different matter is the essence. Motive may have some influence in the amount of punishment; but if A kills B the Law cares not and will not inquire if it was from hate or to rob or from a desire to remove a competitor in love or business or politics. So, too, it is wholly untrue that atonement or retaliation is the dominating feature in punishment—vengeance is outworn and (except in the case of youths who may be expected to reform) practically the sole object of punishment is to prevent the repetition of such acts.

Nor does the Law "recognize its own ineptitude," although it sorrowfully admits its deficiencies in common with all other human agencies.

On the whole it does not seem likely that offend-

ers of any kind will be punished by "temporary committal to a special mental institution combined with an attempt to cure them by means of psychoanalysis."

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

Select Cases and Other Authorities on the Law of Trusts, by Austin Wakeman Scott, Story Professor of Law at Harvard University. Second ed. Published by the author.

This well-bound well-printed volume of 814 pages by the reporter of the American Law Institute on the subject of trusts contains a short preface which reads as follows:

"During the dozen years which have elapsed since the first edition of this book was published the subject of trusts has been one of increasing importance. The number and kinds of trusts which have been created and the value of the property held in trust have greatly increased. New problems and new applications of old problems have been presented to trustees, lawyers and courts. Many recent cases have been inserted in the present edition and the footnotes have been extensively revised. The editor has attempted to furnish the student with sufficient material to show him the nature of the trust device, what it is today and how it became what it is, what are the functions which it performs and how it performs them."

In arrangement the present edition is very much like its predecessor. There is no change in the first four chapters of the first edition except that the subject of "charitable trusts" is now made into a separate chapter whereas it formerly was treated as part of the chapter on "the elements of a trust." This change is distinctly progressive. In addition there are three new sections in the present edition, namely "Powers and duties of the trustee," "Successive beneficiaries" and "Liability of the trustee to the beneficiary."

The writer of this review, having used the first edition in the classroom, is well acquainted with the superb selection and arrangement of the cases contained therein dealing with the subject of "private" trusts and feels that the author's opportunities for improvements in regard to this part of his book were naturally quite limited. Prof. Scott's national reputation as an authority on trusts is founded on the first edition. To say anything more in its praise would be but to carry coal to Newcastle.

The greatest improvement in the present edition over the first may therefore be expected in the chapter "Charitable Trusts." This chapter now contains 50 pages, whereas the corresponding section in Chapter 3 of the first edition dealing with "the elements of a trust" and entitled "The *Cestui Que Trust:* herein of charitable trusts" spread over 90 pages. What is more, the internal arrangement of the material is immeasurably superior to that achieved in the first edition. Starting with the historical background (the statute of 43rd Elizabeth and two early and contrary United States Supreme Court decisions) the author passes in review the four distinct classes of charities and ends with the *cy pres* doctrine. It would be very useful if the author in one or more of his numerous notes were to trace the New York, Michigan, Wisconsin and Minnesota error to the statute abolishing all "trusts" "except as authorized or modified in this chapter," first adopted in New York in 1828 and successively copied by Michigan, Wisconsin and Minnesota; while the Virginia, Maryland and West Virginia error can easily be traced back to the case of *Baptist Association v. Hart* which can be found on page 288 of the book. As it is, the author in one of his notes merely mentions the aberration of these states, not referring to Wisconsin.

The second as compared with the first edition shows clearly that the author is making distinct progress in his understanding of charities. He now gives charities a separate chapter, whereas formerly he treated it as a portion of a chapter on the "elements of a trust." It may therefore be hoped that he will soon reach the conclusion that charities and trusts are distinct subjects which have little if anything in common. This is very important, as he is also the reporter of the American Law Institute on the subject of trusts and, according to the announcements which the reviewer has read, he plans to include charities in the restatement of trusts.

The New York, Michigan, Wisconsin and Minnesota aberrations were due to a construction of the trust statute above mentioned by which charities were considered by these courts as trusts. This is indeed the difficulty which confronts every court and every teacher of trusts in dealing with the subject of charities. Private trusts (so called) and charitable trusts (if this designation is permissible) have nothing in common as the reviewer sees it but the name "trust." There is not a twilight zone but a distinct and visible line between them. Indefiniteness of beneficiaries, which is the badge of charities, is the very bane of trusts. But this is not all. The two subjects are not only separate but are to a large extent contrary. A deep knowledge of the one may not only not be a help but may actually be a hindrance in understanding the other. The teacher of trusts on a particular faculty may well be the least qualified member of that faculty to teach charities.

In view of this situation it is indeed unfortunate that it has become customary to teach charities in connection with trusts. It would be far better if charities could be taught (by some member of the faculty other than the teacher of trusts) in a course on non-profit associations. The reviewer believes that that is the logical and pedagogical place for charities. Possibly the realignment may be achieved at some time in the future.

It is to be hoped that the undeniable progress which Prof. Scott has made in understanding the subject of charities will be continued, so that when he finally takes up the subject of charities in the restatement of trusts the matter will receive an adequate treatment.

CARL ZOLLMANN.

Milwaukee.

Le Droit Corporatif International de la Vente de Soies, par Masaichiro Ishizaki avec une preface par Edouard Lambert. Trois volumes, 1928. Paris: Marcel Giard.—These three French volumes, devoted to the rules and regulations of silk associations in the United States, Japan, China, France, Italy, Switzerland, and other places where silk is produced or bought, form volumes 18, 19, and 20 of the Publications of the Institute of Comparative Law of the University of Lyons France, under the direction of Professor Edouard Lambert, well-known French jurist. The American legal profession is already somewhat familiar with the numerous publications of this Institute in certain fields of law as related to England and the United States in particular, and the volumes now under review form a welcome addition to this collection.

The student of comparative law will find much of interest and value in the publications of this Institute.

The volumes relating to the international legal aspects of the silk associations were written in partial satisfaction of requirements at the University of Lyons for the degree of doctor of law, by a Japanese legal scholar who also holds a diploma from the Institut des Hautes Etudes Internationales of Paris. The authoritative character of the volumes is further vouched for by reason of the fact that they were written under the guiding genius of Professor Lambert himself, who also wrote the Preface and expressly states that he assumes much of the responsibility for statements uttered and conclusions reached by Mr. Ishizaki. Moreover, the author had the assistance of M. Auguste Dargent, of Lyons, France, head of one of the great silk importing associations of France, whose position and aid lend authority to much that Mr. Ishizaki writes. Finally, but of great importance, the Silk Association of America furnished for Mr. Ishizaki's use numerous documents relating to rules and customs of selling and buying silk, as well as the methods of arbitration employed by silk associations. These three volumes are the first authoritative studies relating to the important legal phenomena created by self-imposed rules and regulations of the great silk associations, entirely outside the pale of the law as administered by the courts or other agencies of the State. In truth, as the title of the three volumes expressly indicates, there has arisen as a result of these "corporative controls" a veritable international law relating to the associational activities in the sale and marketing of silk, but, and this is most significant for legal study, solely self-imposed by the associations themselves. The United States is the largest silk-importing country of the world, and the Silk Association of America probably the most unified and most powerful in the silk industry. The fast "silk trains" coming from the Pacific Coast to New York City often carry millions of dollars worth of silk, and are given railway clearance orders rivalling those of rulers of sovereign States. American lawyers who may be called upon to handle litigation, or to advise in the problems, arising out of the silk industry, should know of the various methods of solving them as they may be regulated by the associational activities of the silk associations. These three volumes by Mr. Ishizaki, although in French, do a great deal to inform the legal profession along these lines.

Professor Lambert in his Preface states that the international law relating to associations of silk is the product of three combined factors: 1. Collective arbitration for the settlement of disputes growing out of the silk industry, in the selling and buying of silk. 2. Codification of the usages and customs in the sale, inspection, and purchase of silk. 3. The uniform contract agreed to by the members of these associations. The first factor has given rise to permanent "colleges" of skilled experts or arbitration officials at Zurich, Lyons, New York, Milan, and other places where silk associations exist, which possess a stability and mode of procedure for handling disputes rivalling those of courts of justice of the State. The second factor has given rise to conventions between sellers and buyers which have dealt with all phases of the silk industry in its international aspects, because silk is produced largely in the Orient and purchased all over the world, and has resulted in the creation of ententes that have the binding force of law in all matters relating to the sale and purchase of silk. The last factor, the uniform contract, which prohibits all resort to the courts of the State by means of the specialized personnel of arbitrators, has created a body of law entirely outside the control of the State; and in countries like the United States, where State and federal laws exist permitting irrevocable contracts of arbitration, the sanction of law, while more express and direct, is of no greater compulsion than in countries where the parties themselves have "ousted the courts of jurisdiction" by these devices. Thus, through these various types of machinery set up by the silk associations, a uniformity of "corporative" right and duty is created, which would not be possible were the principle of "conflict of private law" of each sovereign State, to say nothing of 48 semi-sovereign States of the American union, allowed to operate in the silk industry.

The motives behind these corporative controls of the silk industry, which resulted in the above factors, may be said to be the following: 1. Reaction against the letter of statutes and judicial decisions which often, when applied, prevented a practicable solution of controversies. 2. Resentment to a mechanical jurisprudence which applied rigidly rules of law generally, without allowance for concrete situations which should have been treated differently by the tribunals of the State, whether courts or administrative agencies. 3. Belief that, in commercial matters generally, judicial doctrines of judicial logic were not adequate in obtaining justice. 4. Attempts to settle the controversies arising out of the silk trade of selling and buying by summary or more expeditious methods, rather than by the slow and technical procedure of the courts. All these motives might be summed up in the generalization that the silk associations wanted a "law of equity" applied to the solution or settlement of their controversies, rather than the juridical law of the courts or agencies of the State, with their slow or archaic procedure, made more difficult still by the fact that the countries producing silk had a system of law very different from those where the silk was bought. Hence the silk associations formed their own law to govern these situations, and thus became, as it were, a law unto themselves, within the "shadow" of the State.

Mr. Ishizaki's three volumes analyze themselves as follows: Volume 1 deals with the needs for uniform treatment of the rules and regulations of the silk industry, because of the great number of countries which bought the silk produced by the Oriental countries. Thereafter, the volume is devoted to the obligations of the seller of silk. In the second volume, treatment is concerned largely with the buyer of silk, with detailed attention to arbitral arrangements by the various silk associations. Volume three sets forth uniform contracts of sale of silk by the silk associations, with specimen forms. There is also a detailed index of great value. A careful examination of the three volumes indicates that the work has been well done, and it is unfortunate that they have not been translated into English, or that a similar work is not available to English readers in America.

The legal significance of this study of the legal aspects of the silk associations is well summarized by Professor Lambert in the Preface, quoting from Emmanuel Levy in 1903, from his work "La Vision Socialiste du Droit," p. 120, 132, 143, 152: "The arbitrator replacing the judge is one of the signs of the times. In place of individual and perpetual rights, there are being substituted collective and temporary rights; for the persuasion of the State those sanctioned

by the State or even without the State. Contract has replaced the law. Man takes down the beliefs of his group; there is a fusion of civil, penal, and disciplinary sanctions. Collective arbitration is the expression of a changing economy."

I commend these three volumes by Mr. Ishizaki to all our American legal profession who may be interested in the legal aspects, in their international characteristics, of the silk associations.

E. F. ALBERTSWORTH.
Northwestern University Law School.

American Library Laws, compiled by Milton J. Ferguson. 1930. Chicago: American Library Association. 1103 pages, quarto.—This is a compilation of the general statute laws governing the establishment and organization of tax-supported libraries, state, municipal, school, etc., now in force in the states of the Union, the possessions and dependencies of the United States, and the British colonies and dominions in the western hemisphere. The official text of these laws is English. Mexico, which does not fall within any of the above named categories, is included, its laws being given in Spanish. The reason for this inclusion, while the other Spanish-American countries are excluded, is not apparent unless the compilation was meant to be limited geographically to North and Central America, as is suggested in the preface. The compiler, now librarian of the Brooklyn Public Library, was formerly state librarian of California, and the formidable volume of eleven hundred pages is published by the American Library Association under a subvention from the Carnegie Corporation. Presumably, therefore, it is intended for the use of librarians and library administrators rather than of lawyers, who will not have frequent need to turn to it in the course of the day's work.

While any collection of laws upon a given subject doubtless has its uses, it would seem that the present one will hardly become a desk book or daily companion even for the librarian, since he, ordinarily, has but little occasion to refer to any library laws other than his own. It should also be pointed out that these are only the *general* laws and make almost no mention of the special or "local" laws, nor of city charters and ordinances, which often materially modify the provisions of the general statutes, especially where the municipality is under a city manager, or the public library under the city school board. Inclusion of all this material would, of course, have been practically impossible, but inclusion of the word "general" in the title might have put the user upon notice that it was not there.

A more puzzling omission is that of the dates of original enactment of the several statutes and of their successive amendments, a well-nigh indispensable feature which no official compiler would dream of leaving out, and which might easily have been copied along with the laws themselves. If to this there might have been added a brief citation of obsolete or superseded laws, if any, we should have had a historical conspectus of the rise and development of American library law that would have been interesting and valuable to many others besides librarians. In exchange for these very pertinent data, we should, personally, have been willing to dispense with such exotics as the laws of the British colonies, from Antigua to the Windwards, and the American possessions, from Guam to the Virgins, which together fill up some eighty pages of good white paper to no particular purpose. C. B. RODEN.
The Chicago Public Library.

The reviewers in this number are:

The Right Hon. Lord Macmillan.

Charles H. Dennis, Editor of the Chicago Daily News.

Charles E. Merriam, Head of the Department of Political Science, University of Chicago.

Edwin W. Patterson, Professor in the Law School of Columbia University.

Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario, Appellate Division.

Carl Zollmann, of the Milwaukee Bar, Professor in Marquette University School of Law.

E. F. Albertsworth, Professor in the Law School of Northwestern University.

C. B. Roden, Superintendent of the Chicago Public Library.

C. P. M.

Leading Articles from Current Legal Periodicals

Illinois Law Review, May (Chicago)—The Restatement of the Law of Contracts, Foreword, Edgar Bronson Tolman; Illinois Annotations, by Harold Wright Holt; The Executory Accord, by Harold Shepherd.

Oregon Law Review, April (Eugene, Ore.)—A Survey of the Grand Jury System (Part II), by Wayne L. Morse.

Virginia Law Review, April (Charlottesville, Va.)—The Supreme Court and State Police Power, 1922-1930, by Thomas Reed Powell; The Individuality of Business Associations, by Scott Rowley; Observations upon the Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners, by Jackson H. Ralston.

Canadian Bar Review, April (Toronto, Ont.)—Economic Changes and the Practice of Law, by J. Ragnar Johnson; The Doctrine of Hot Pursuit, Part III, by J. Stafford H. Beck; Legal Aid for the Poor, by James Edmund Jones; The Official Language of the Courts in Saskatchewan, by Mr. Justice Taylor; Encroachments on Lawyers' Activities.

Philippine Law Journal, March (Manila)—The Legality and Effect of a Matrimonial Separation Agreement, by Florencio C. Martelino; A Critical Analysis of the Philippine Law on Counterclaims, by Honesto K. Bausa (continuation).

Mississippi Law Journal, May (University, Miss.)—The High-Lights of the Great Sanhedrin, by Gabe Jacobson; The Sprague Case, by H. H. Creekmore; Section 147 of the Constitution of 1890, by D. M. Russell; Liabilities of Municipal Corporations in Mississippi, by Kenneth P. Vinsel.

Yale Law Journal, April (New Haven, Conn.)—Hedging and Wagering on Produce Exchanges, by Edwin W. Patterson; The Remedy of Revindication in Latin-American Bankruptcy Laws, by Valerian E. Greaves; Legal and Institutional Methods Applied to the Debiting of Direct Discounts—IV. The South Carolina and Pennsylvania Studies, by Underhill Moore and Gilbert Sussman.

Marquette Law Review, April (Milwaukee)—Adverse Possession, by Adolph Kanneberg; Another Version of the Legal Status of Women in Wisconsin, by Mrs. Julia B. Dolan; Blue Sky Law in Wisconsin, by Bruno V. Bitker.

The Lawyer and Banker and Central Law Journal, March-April (New Orleans, La.)—Amending the Constitution, by Francis S. Key-Smith; The Unlawful Practice of Law, by Hon. C. J. Roberts; Obligation of State Attorney to Safeguard Accused, by Percy Saint; Taxation of Foreign Corporations, by Romaine H. Crosby; Federal Juries, by Thomas W. Shelton.

Law Notes, April (Northport, N. Y.)—Billboard Regulation, by Harry Rockwell; Evidence of Birthmarks, Bruises, Scars, by Carl V. Venters.

North Carolina Law Review, April (Chapel Hill, N. C.)—Interest as Damages, by Charles T. McCormick; Divorce in South Carolina, by J. Nelson Frierson; Territorial Jurisdiction of Local Law Enforcement Officers, by Charles M. Kneier.

West Virginia Law Quarterly, April (Morgantown, W. Va.)—Juristic Law and Judicial Law, by Joseph H. Beale;

Public Utilities. I. The Quest for a Concept, by Thomas P. Hardman; The Liability of an Aviator for Damage to Persons and Property on the Ground, by Julian G. Hearne, Jr.

American Journal of International Law, April (Washington, D. C.)—Limits of the Jurisdiction of the Permanent Court of International Justice, by Frank B. Kellogg; Recognition Cases, 1925-1930, by Edwin D. Dickinson; Freedom of the Air in the United States, by Blewett Lee; Sanctions Constraining Diplomatic Representatives to Abide by the Local Law, by Chesney Hill; The Treaty Making Power in Japan, by Kenneth W. Colegrove.

Temple Law Quarterly, April (Philadelphia, Pa.)—The Knickerbocker Trust Company—A Study in Receivership, by John Hanna; Methods of Communicating and Negotiating Agreements with Unrecognized Governments, by N. D. Houghton; Self-Incrimination in the Modern American Law, by J. A. C. Grant; Multi-Partite Aerial Agreements, by William M. Gibson.

Harvard Law Review, April (Cambridge, Mass.)—An Imaginary Judicial Opinion, by Thomas Reed Powell; Some Observations Concerning Presumptions, by Edmund M. Morgan; Allocation of Income by Corporate Contract, by Roswell Magill.

Minnesota Law Review, April (Minneapolis)—Jurisdictional Amount in Representative Suits, by William Wirt Blume; Some Characteristics and Tendencies of English Criminal Justice, by Pendleton Howard; The Convenience of the Public Interest Concept, by J. A. McClain, Jr.

United States Law Review, April (New York City)—Prohibition Proposals and Opinions; Corporations and the Practice of Law, by John G. Jackson.

Michigan Law Review, May (Ann Arbor, Mich.)—State Utilities and the Supreme Court, 1922-1930, by Thomas Reed Powell; Administrative Finality, by A. Martin Tollefson; Bases of Jurisdiction in State Taxation of Inheritances and Property, by Charles L. B. Lowndes.

University of Pennsylvania Law Review, May (Philadelphia, Pa.)—Legal Rules; Their Function in the Process of Decision, by John Dickinson; Preliminary Analysis of Concurrent Jurisdiction, by Hessel E. Yntema, George H. Jaffin; The Pennsylvania Bailment Lease, by James A. Montgomery, Jr.

SOME LEGAL PROBLEMS OF THE MOTION PICTURE INDUSTRY

By J. Byron McCormick
Associate Professor of Law, University of Arizona

(*Continued from the May Issue*)

Block Booking and Blind Booking

IN EARLY years films were sold outright to exhibitors, but there came a time when it seemed feasible for exhibitors to rent rather than buy their films, due in part, no doubt, to the need for frequent changes of program rather than showing the same film a long period of time, as was the early custom. Organizations called exchanges were formed, which bought the films from producers, then rented them to the exhibitors. One of the exhibitors dealing with the first exchanges organized was David Grauman of San Francisco, father of Sid Grauman, the prominent exhibitor of Hollywood.[40] The first great exchange was the General Film Company organized in 1910 by the Patents Company for the purpose of distributing its films.[41] At this time film prices were fixed at so much per foot, the exhibitor's principal interest being to furnish a program of a certain length. This plan later gave way to what was known as the "Star Plan" where pictures were sold in groups, the exhibitor being offered "for instance six Pickfords or six Harts."[42] This was the beginning of the attractive salaries for the stars of the film world, the prominence of the actor or actress fixing, in a large measure, the rental price of the film. This was also, to some extent, the fore-runner of the so-called Block Booking and Blind Booking. The exchanges are almost a thing of the past, as the producers now handle the distribution of their own films in most cases, thereby dealing directly with exhibitors. The Producers have been referred to as the Manufacturers, the Distributors as the Wholesalers, the Exhibitors as the Retailers, and the Public as the Consumers. It will be noted then that the wholesaler has been practically eliminated; likewise with the acquisition and building of theaters by the producers, it appears that the retailer may follow the course of the wholesaler, leaving only the manufacturer and consumer in the field, or probably more correctly speaking, the manufacturer will do his own retailing. No doubt the elimination of the distribution department as a distinct department has its advantages in that it better enables the producer to market his films, at the same time saving the exhibitor a middle man's profit.

Due in part, may be, to the need of the producer to market all his pictures and not just the super features and as well to more economically handle distribution, about the year 1920,[43] the plan of Block Booking was adopted. It is "the simultaneous sale to an exhibitor of a number of motion pictures for release and delivery to the exhibitor over a period of time, the pictures being offered as a group and the aggregate price being in part dependent on the quantity taken."[44] By this plan the exhibitor buys (i. e., buys the license to show), a number of pictures from the producer in one lot, some exceptional and very desirable, some ordinary, the total varying in number generally from 20 to 60. As an inducement to secure the signature of the exhibitor on the dotted line, the block is priced at considerably less than the total price of the individual pictures. The advantage to the producer is the sale of a number of his pictures at one time and in a lot, those of questionable box-office value being put with those most certain to draw. The advantage to the exhibitor is to be found in securing through a few contracts, a season's bookings. Many of the pictures in the block will not then have been released, in fact production may not yet have even started. In other words, the exhibitor buys sight-unseen. This is called "Blind Book-

40. Ramsaye 426-427.
41. See article by Professor Howard T. Lewis on "Distributing Motion Pictures," Harvard Business Review No. 3, Vol. 7, page 268.
42. Lewis supra 270.
43. Lewis Ibid. 278.
44. From Material on Marketing Motion Pictures furnished by the Harvard Business School.

ing." The practice of Block Booking and Blind Booking has its critics, for legislation has been proposed in congress to make it illegal to book pictures in this fashion, the Federal Trade Commission has instituted proceedings to enforce its orders directing certain producers to refrain from compelling exhibitors to lease pictures by block, and a suit against Famous Players Lasky Corp., is pending in the United States Circuit Court of Appeals, Second District. The proceedings brought by the Federal Trade Commission, other than those involved in the case mentioned, were dismissed by that Commission on the grounds that a similar case was before the Federal Court and that the same matter was before Congress for positive legislation.

The two sides to the question of Block and Blind Booking were presented in the hearing before the Committee on Interstate Trade and Commerce on the Brookhart Bill[45] which was drawn to prevent Block and Blind Booking, to prevent restraint on free distribution of copyrighted films, and to prevent arbitrary allotment. A second bill was offered by Senator Brookhart on May 7, 1929,[46] to prevent as in his previous bill, Block and Blind Booking. In addition, this later Bill sought to prevent the forcing of arbitration on the exhibitor. It was referred to the Committee on Interstate Commerce.

In the hearing on the first bill before the Committee on Interstate Commerce, Senator Brookhart and representatives of Independent Exhibitors spoke in favor of the bill contending that while Block and Blind Booking were being forced upon independent exhibitors, the producers did not enforce the same in their own houses; that it forced the product of the producers upon the exhibitor, with the result that the independent exhibitor was being forced out of business; also that it created a monopoly. Attorney Charles C. Pettijohn[47] spoke before the Senate Committee against the bill, contending that the alleged creation of a monopoly was an erroneous assumption on the part of Senator Brookhart; that the bill discriminated and made an exception of the motion picture industry; that pictures were not thus forced upon the exhibitors, if one didn't like those offered by a certain producer he might buy from another; that Block Booking is nothing more than wholesale buying; that Blind Booking is nothing more than making sales for future delivery; that Paramount had tried booking as provided for in the bill but had found that exhibitors preferred to buy on the wholesale plan. Then referring to what he termed "the most extraordinary part of the extraordinary bill" he asserted that the producer would practically be compelled to sell his products at public auction. Senator Brookhart speaking in support of his second bill, on May 7, 1929,[48] referred to what he termed "trustification" of the industry; the plan to end competition in the industry; the wiping out of independents; the growing concentration of control; the plight of the theater owner. Further, after presenting the argument as to whether or not monopoly was desirable, he assured that the bill would outlaw Block and Blind Booking and give to the theater owner the right of selection. Referring to the exhibitors, he said: "They do not desire government regulation as such, but they would rather remain in business with regulation than be driven out of business for want of it."

In defense of Block Booking, Distributors, in testifying before the Federal Trade Commission, have advanced the contention that: (1) It is simply wholesaling applied to the sale of motion pictures just as wholesaling is applied to the sale of ordinary commodities. (2) It reduces the cost of distribution, thus benefiting the distributors and, in turn, the exhibitors. (3) It simplifies the buying problem of exhibitors by making it possible to obtain a year's supply of pictures in a few large purchases. (4) It assures the producer of a definite income which enables him to make better pictures than he otherwise could make. (5) It has been found more successful than any other method that has been developed by any distributing company. Those testifying against Block Booking attacked it on the following grounds that: (1) It limits an exhibitor's choice, often forcing him to take pictures which he does not want. (2) It assures the distributor an income on all pictures, regardless of the quality. (3) It causes over-buying on the part of exhibitors. (4) It enables a distributor to usurp the playing time of exhibitors to the exclusion of other distributors.[49]

In looking at the grounds upon which Block Booking is attacked, it is hard to find anything unlawful in the practice unless the all or none policy is actually followed. In case of forced Block Booking, there would, no doubt, be an unreasonable or undue restraint on trade; then the practice would be illegal; but if the exhibitor is given the choice of buying a block or buying single pictures, at a price which does not necessarily force him to buy by block, the policy is surely within the law. Imagine the position of the exhibitors as to the purchase of news reels if Blind Booking were prohibited. The validity of the practice will be passed upon in the case of Federal Trade Commission v. Famous Players Lasky Corporation now pending in the United States Circuit Court of Appeals, Second District. This case was striken from the calendar by consent on October 10, 1929,[50] but will no doubt appear on the calendar again in the near future.

Credit Rules

For years, distributors of films suffered great losses due to the sale or transfer of theaters by irresponsible exhibitors with uncompleted contracts existing between distributors and the exhibitor without providing for assumption by the buyer of such existing contracts. When the new owner failed to complete the contracts, the films were thus thrown back upon the distributors. Often these films had, for exhibition purposes, become stale, and would not sell readily even though an exhibitor without a full program might be found. In addition, in many instances, transfers of theaters were fictitious, the new owner being nothing more than a dummy of the seller, the transaction itself being a mere set-up for the purpose of avoiding contracts. During the year 1927, the aggregate rentals involved in uncompleted contracts of

45. S. 1667, 69 Congressional Record 544.
46. S. 1003, 71 Cogressional Record 927.
47. Former Attorney for the Motion Picture Producers and Distributors of America Inc.
48. 71 Congressional Record 927.
49. From Material on Marketing Motion Pictures furnished by the Harvard Business School.
50. Mr. Parkin, the Clerk of that Court so advised in correspondence of April 14, 1930, and December 15, 1930.

theaters transferred to new owners was $7,297,374.15, and in 1928, the sum was $9,843,970.23.[51] This situation brought about combined action by distributors to relieve themselves from the effect of such transactions, resulting in the adoption of uniform rules and regulations known as Credit Rules. The plan was carried out through the Film Boards of Trade made up of the exchange managers representing distributors of 98 per cent of the films distributed in the United States. The President of the Film Board of Trade was authorized by the distributors to appoint a Credit Committee of three members to investigate, and report to the members, on a form designated as "Credit Information List," the names of all persons acquiring by purchase or transfer theaters located in the territory within which the particular Film Board of Trade operated.

The credit rules adopted provided for securing information as to whether or not purchasers of theaters assumed existing exhibition contracts and the furnishing of the same to members; also for each member furnishing the secretary of the Credit Committee a statement of existing contracts with the particular theater; that the secretary of the Credit Committee upon learning of the transfer of a theater should request the new owner to furnish the Credit Committee, within five days from the date of such request, certain information to enable the Credit Committee to report the credit standing of such new owner. For the purpose of securing such information the Credit Committee was directed to adopt a form of questionnaire.[52] Other rules provided that the Credit Committee should notify the members of the failure or refusal of the new owner to furnish the desired information; that the committee informs the members when upon investigation the committee concluded a theater had been transferred for the purpose of avoiding uncompleted contracts for exhibition; that the Committee, in those cases where the new owner refused to assume uncompleted contracts made by the prior owner, indicate on the Credit Information List the amount of cash security not to exceed the sum of one thousand dollars ($1,000) which in the judgment of the Committee, members should require to be deposited as security for the performance of each contract thereafter made for the exhibition of pictures at such theater; and that no member of that Film Board of Trade should enter into a contract for pictures with such theater without exacting the cash security specified by the Credit Committee. The rules gave the Credit Committee the right to examine the books and records of members in respect to their dealings with such theater and any member violating the rules or regulations was subject to suspension or expulsion from membership by a majority vote of the members of that Film Board of Trade.[53]

This practice of the distributors was attacked by the government in the case of United States v. First National Pictures, Inc., et al, a suit in equity under Section 4 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, 15 U. S. C. A. Sec. 4), brought in the United States District Court for the Southern District of New York,[54] to enjoin the First National Pictures, Inc., and others, from further engaging in a conspiracy in restraint of interstate trade and commerce in violation of Section 1 of said Act (15 U. S. C. A. Sec. 1). The suit in the District Court resulted in a decree for the defendants, with vindication for the Credit Rules adopted. The Court found that no exhibitor had complained and that no injury was shown either to individuals or to the general public; that the purpose of the agreement between the distributors in requiring security for the performance of new contracts was to induce the theater owner to go on with the old contracts, for the performance of which no security was required; that all badges of unreasonable restraint were lacking, there being no suppression of competition, nor any attempt to monopolize; that, on the contrary, serious trade abuses had been eliminated, whereby both exhibitors and distributors benefited; that it appeared from the evidence that distributors were always willing to meet the exhibitor's business necessities, to scale down the contract requirements, and, if desired, to substitute other pictures for those contracted for, hence the agreement was not unreasonable or unlawful, nor in restraint of interstate commerce, under 15 U. S. C. A., Sections 1, 4, 26 Stat. 209, holding "combinations and agreements designed to promote fair and honorable dealing, and to correct fraudulent and irregular trade practices in themselves obstructive to trade, are not unlawful, if in purpose and effect they do not suppress competition but merely regulate competition, and thus promote the free flow of commerce."

The United States Supreme Court took a different view of these rules from that taken by District Judge Thacher and by a decision of November 24, 1930, the cause was reversed and remanded.[55] Mr. Justice McReynolds delivering the opinion of the Court pointed out that the obvious purpose of the adoption of the Credit Rules was "to restrict the liberty of those who have representatives on the film boards and secure their concerted action for the purpose of coercing certain purchasers of theaters by excluding them from the opportunity to deal in a free and untrammeled market," and referring to what had been said by the Court in the case of Paramount-Famous-Lasky Corporation, et al. v. United States[56] and to the opinions of this court in other cases, held the arrangement conflicts with the Sherman Anti-Trust Act.[57]

Cadwalader, Wickersham & Taft, of New York City (Edwin P. Grovenor, Arthur L. Fisk, Jr., Gabriel L. Hess, attorney for the 'Hays Organization', all of New York City, of counsel), represented the defendants in this case and in U. S. v. Paramount-Famous-Lasky Corp., et al., the arbitration clause case, before the District Court (Charles C. Pettijohn was also of counsel for defendants in the former), while Cornelius W. Wickersham, John

51. See U. S. V. First National Pictures, Inc., et al. 34 Fed. (2d) 815, 819 (1929).

52. A copy of the questionnaire adopted is set out in United States v. First National Pictures, Inc., et al. 51 S. Ct. 45 page 47, 75 L. ed. (Adv. 61 page 63). (Nov., 1930.)

53. The various Credit rules adopted may be found in 34 Fed. (2d) 815, 816, 817, 818.

54. See Note 51 supra.

55. See Note 52 ante.

56. The arbitration clause case. Note 35.

57. For a case in which Credit Rules were approved see Swift & Company et al v. U. S. 196 U. S. 375, 49 L. ed. 518. (The Court affirmed a decree which provided the defendants, Swift & Co. et al., were not to be restrained from establishing and maintaining rules for the giving of credit where the rules are for the sole purpose of protection against dishonest and irresponsible dealers. The injunction issued by the Circuit Court for the Northern District of Illinois, 122 Fed. 529, is set out in a note 49 L. ed. 518, 523, 524.)

W. Davis and Henry W. Taft appeared as their counsel in both cases before the United States Supreme Court on appeal.

While directors work with the casts on the "lots" in Hollywood and in the studios of New York and the pictures of America's sweethearts flicker on the silver sheets of the Piccadilly and Orpheum along the Rialto, the employers may now meditate upon the decisions of our Court of last resort and their counsel renew their labors in the framing of contracts.

It is submitted that the distributors' difficulties lie in their united action in these matters and it would seem that in the future each distributor will be obliged to follow his individual course in his dealings with exhibitors.

Meeting of the Council on Legal Education and Admissions to the Bar

THE Council on Legal Education and Admissions to the Bar held its usual Spring meeting in Washington, D. C., at the time of the Law Institute meeting. The resolution proposed at the last annual meeting of the Association in reference to the giving of a course in Professional Ethics by the law schools, was discussed at length. A report was formulated and presented to the Executive Committee showing what the Council had done in response to the action of the Executive Committee in referring the above mentioned resolution to it. Information gathered by the Council showed that of the seventy-five law schools on the approved list of the American Bar Association, 25 or 33.3% require a course in Professional Ethics, 19 or 25.3% have an elective course on this subject and 31 or 41.3% have no separate course dealing with it. The Council in December conferred at length with representatives from the faculties of some of the leading law schools of the country, and before its meeting on May 4 also had a discussion of the subject with the Committee of the American Bar Association on Professional Ethics and Grievances. A questionnaire, answers to which were received from forty-one Boards of Bar Examiners, showed that in nine states separate examinations on Professional Ethics are given in every bar examination, while in twenty-one others questions are included on this subject regularly and in two others the same thing is done occasionally. A substantial majority of the Chairmen or Secretaries of the Boards who answered the questionnaire stated they were in favor of giving questions on this topic.

The Council reported to the Executive Committee that it proposed to bring up the question both in the Section meeting and in the Conference of Bar Examiners to be held at the time of the annual meeting of the Association. It will ask the help of the Bar Examiners through the giving by them of questions on the subject of Professional Ethics in their examinations. It recommended the method of cooperation with the law schools as the manner of bringing about the desired result, and a sub-committee of the Executive Committee was appointed to consider its specific recommendations.

The School of Law of Duke University, Durham, North Carolina, was added to the list of approved law schools, and the School of Law of Howard University, at Washington, D. C., was also approved, except as to students who commenced their law school study prior to April 14, 1931. Howard Law School is the only negro law school in the country which has ever been approved by the American Bar Association.

The resolution introduced by Dr. William Draper Lewis and passed at the last meeting of the Section of Legal Education in Chicago in regard to bringing law students into personal contact with members of the profession of high standing, was discussed and a report on that subject was prepared, which will be printed in the advance program of the coming Association meeting and will be presented to the Section when it next meets.

The Council informed the Committee that it was arranging for a Conference of Bar Examiners at Atlantic City in September, and that every attempt is being made to stimulate interest in it, to the end that there be a representative attendance at this, the first meeting. It is believed that the examiners will welcome this opportunity for a discussion of their problems and that a permanent organization will result.

Very gratifying progress was reported in reference to raising the qualifications for admission to the bar in a number of states. Since the last meeting of the Council, the New Jersey Supreme Court rules have been amended to require two years college education before the beginning of law study; the North Dakota Legislature has passed an act, effective 1936, requiring two years of college of all applicants; the New Hampshire Supreme Court has raised the standards of preliminary education in that State by requiring a high school education before admission to the bar and a similar bill in California has passed the House. In Indiana the Legislature has passed an act placing in the hands of the Supreme Court complete power to fix qualifications for admission to the bar. This has been signed by the Governor and is now a law. Utah has passed a Bar Organization Act giving the State Bar Association authority to fix standards for admission, with the approval of the Supreme Court, and in Kentucky the Court of Appeals has amended its rules so as to increase the requirement of law school attendance in that state from one to two years. In Iowa, Nebraska, North Carolina, and South Dakota, bills of various kinds, relating to raising the standards of admission, either directly or indirectly, were introduced but either failed of passage or have not yet been acted upon. Since the first of the year the State Bar Associations of both Arizona and Florida have gone on record as approving the Standards of the American Bar Association. At the present time sixteen states require substantially all their candidates for admission either presently or prospectively to have at least two years of college education in addition to law training, and the Bar Associations of seventeen more states have approved this course, according to the report of the Council.

Washington Letter

1266 National Press Bldg.,
Washington, D. C.
May 9, 1931.

Quo Warranto Proceedings Against Chairman of Federal Power Commission

ON May 4, 1931, there was filed, in the Supreme Court of the District of Columbia, by Honorable John W. Davis and Honorable Alexander J. Groesbeck, counsel for the United States Senate, in the name of Leo A. Rover, United States Attorney for the District of Columbia, a petition for writ of quo warranto against Honorable George Otis Smith, Chairman of the Federal Power Commission.

The petition sets forth the various steps in the appointment and confirmation of Mr. Smith and the subsequent proceedings in the Senate reconsidering the action taken, refusing to consent to the nomination and directing the quo warranto proceedings to be instituted. The petition also sets forth the rules of the Senate respecting proceedings on nominations.

The petition then recites:

"That by reason of the matters and things hereinbefore shown to the Court, the said George Otis Smith, the commission issued to him on the 22nd day of December, 1930, as aforesaid, to the contrary notwithstanding, has not been duly and legally appointed to the office of member of the Federal Power Commission, or duly and legally designated as Chairman thereof; that he has usurped, intruded into and now unlawfully holds and exercises the office of member of the Federal Power Commission and Chairman thereof, and unlawfully claims and assumes to be such member and Chairman."

The petition prays that a writ of quo warranto issue against George Otis Smith requiring him to show by what warrant he holds or exercises the office of member and Chairman of the Federal Power Commission; that he be required to answer the averments of the petition and that such proceedings be had as are prescribed by law; and if, thereupon, it shall be adjudged that said George Otis Smith has so usurped, intruded into and unlawfully holds the office of member and Chairman of the Federal Power Commission, that he be ousted and excluded therefrom.

Federal Power Commission

On April 3, 1931, the Federal Power Commission rendered a decision on the application of the Appalachian Electric Power Company to construct a proposed dam and power project on New River near Radford, Virginia. The Commission had previously held that said project "unless operated in the interests of interstate or foreign commerce in accordance with the requirements of said Act, would have an adverse effect on such interests, but if operated in accordance with such requirements would materially benefit such commerce," and found that the river at that point was "not navigable." The company refused to accept a license in standard form and asked the Commission to reconsider the finding made or to issue a minor part license for the project. At the final meeting prior to reorganization of the Commission, the Commission declined to take action on the application.

When the new Commission was organized the case was heard and the question of jurisdiction was raised. Opposed to the Commission taking jurisdiction on the application were: Honorable E. Lee Trinkle, for the region in which the project was proposed to be constructed in Virginia; William E. Carson, Esq., Chairman, Virginia Conservation and Development Commission; E. W. Caffee, Esq., Maylor of Pulaski, Virginia; F. M. Livezey, Esq., for the Public Service Commission of West Virginia; C. R. Luker, Esq., representing the Governor of Kentucky; Honorable Roy H. Beeler, representing the State of Tennessee; Honorable John H. Caldwell, Assistant Attorney General of Arkansas; and Honorable Edwin H. Gibson, Assistant Attorney General of Virginia.

Those in support of the jurisdiction of the Commission in the specific instance covered by this application were: George W. Woodruff, Personal Counsel to Honorable Gifford Pinchot, Governor of the State of Pennsylvania, and Herbert S. Ward and other counsel for the National Popular Government League.

The Commission held that it had jurisdiction and the following is quoted from its decision:

"The majority of the Commission is of the opinion that the suggestion does not involve the question of the jurisdiction of this Commission over New River, but merely the question of the ground upon which such jurisdiction shall be predicated; and that the ultimate determination of what is 'navigable waters' under the Federal Power Act in any case is one for the courts and that any finding made by this Commission as to what are *navigable waters in law* would not be binding upon the Courts.

"It is the judgment of a majority of the Commission, in view of the conflicting evidence and

opinion as to New River being 'navigable waters within the definition of the Act,' that jurisdiction is more properly based upon Section 23 of the Act, applicable to streams of this character where the authority of the Commission is clearly defined, leaving to the Courts the determination of the question of 'navigable waters as defined in the Act.'

"It is the unanimous opinion of the Commission that the evidence clearly sustains the finding that the proposed construction would affect the interests of interstate and foreign commerce."

That part of section 23 of the Act referred to in the opinion reads as follows:

"That any person, association, corporation, State or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several states, may in their discretion file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

Federal Radio Commission

In a statement issued May 7th by the Federal Radio Commission, warning was given against the broadcasting of fortune telling, lotteries and similar programs by a broadcasting station. The announcement reads as follows:

"Upon frequent occasions there has been brought to the attention of the Commission complaints against radio stations broadcasting fortune telling, lotteries, games of chance, gift enterprises, or similar schemes offering prizes dependent in whole or in part upon lot or chance. On that subject the Commission has to say:

"'There exists a doubt that such broadcasts are in the public interest. Complaints from a substantial number of listeners against any broadcasting station presenting such programs will result in the station's application for renewal of license being set for a hearing.

"'Copies of this statement were this day ordered by the Commission to be mailed to each broadcasting station licensed by the Commission.'"

This action came as a result of the Commission's action denying request of the American Newspaper Publishers Association that the broadcasting of such programs be prohibited as unfairly competitive with other advertising media. The Commission held that it lacked legal authority to promulgate such a regulation and that it was a matter for legislation by Congress.

While the Commission cannot exercise a power of direct censorship of programs it may consider the merit of programs broadcast by stations as a condition precedent to the granting of a renewal of license.

Treaties and Other International Acts of the United States of America

The first volume containing the early treaties of the United States has just been published by David Hunter Miller, according to an announcement by the Department of State April 22. Mr. Miller was especially retained by the Department to edit a series of volumes on the treaties of the United States.

The new volume, which is Volume 2, of the series, contains all treaties from 1778 to 1818. Volume 1 will not be ready for publication until some time in July. The treaty edition as a whole will comprise at least 10 volumes to be published from time to time.

Indian treaties and postal conventions are not included among the documents in the treaty edition. The price of Volume 2 is $4.00, including postage. Copies may be obtained from the Superintendent of Documents, Washington, D. C.

Regulation of Oil Industry

In a statement on April 13th, Senator Borah indicated that he would approve legislation to make the petroleum industry subject to Government regulations similar to those now applied to public utilities. Respecting the administration moves seeking limitation of production and imports as a means of relieving the depression in the oil industry, the Senator asserted: "We certainly will not consent to production being controlled without controlling the price the public must pay."

Connecticut

HARRISON HEWITT
President Connecticut State Bar Association

State Bar Association of Connecticut Holds Annual Meeting

The Annual Meeting of the State Bar Association of Connecticut was held at New Haven on Monday, April 27th, 1931, at 2:30 P. M.

The President, Harrison Hewitt, Esq., of New Haven, delivered the annual address reviewing the work of the association for the past year.

Hon. Robert L. Munger, Judge of the Common Pleas Court for New Haven County, read a most interesting and suggestive paper on "Judge and Jury," discussing the unnecessary length of many of the charges to the jury and the difficulty of the average juryman in understanding the charge of the court.

Sanford Stoddard, Esq. of Bridgeport, Chairman of the Committee on Jurisprudence, reported that all of the bills, with one exception, prepared by the Judicial Council of Connecticut were approved by the Committee and that a member of the Committee appeared to support these measures at the hearings of the Judiciary Committee of the General Assembly of Connecticut. Among other bills approved by both the Judicial Council and the Committee on Jurisprudence of the State Bar Association was the bill establishing District Courts in Connecticut in place of the present city, town and borough courts. This bill was modelled after the system of District Courts established in Massachusetts. The bill, however, was rejected by the General Assembly of Connecticut.

Allan K. Smith, Esq., of Hartford, reported for the Committee on Moral Qualifications a recommendation that a uniform system of examining the moral qualifications of candidates for admission to the bar be established. This recommendation was adopted and request will be made to the Judges of the Superior Court to make a new rule of court on the subject.

Hon. John K. Beach reported for the Special Committee on Co-operation with The American Law Institute that under the direction of Professor Arthur L. Corbin, Connecticut annotations are being prepared for the Re-statement of the law of Contracts, for which the State Bar Association has agreed to pay the cost.

Warren F. Cressy, Esq., of Stamford, reported for the Delegates to the Conference of State Bar Delegates held at the annual meeting of the American Bar Association.

The following were re-elected officers of the Association: Harrison Hewitt, New Haven, President; David S. Day, Bridgeport, Vice President; James E. Wheeler, New Haven, Secretary and Treasurer.

The annual dinner of the Association was held at the New Haven Lawn Club in the evening. Two addresses were delivered, one by Professor T. W. Arnold, of the Yale Law School, and the other by Hon. Wm. M. Maltbie, the new Chief Justice of Connecticut.

JAMES E. WHEELER, Secretary.

Kentucky

Kentucky State Bar Association Holds Annual Meeting

The Thirtieth Annual Meeting of the Kentucky State Bar Association was held at Somerset, Kentucky, April 9th and 10th, 1931. The attendance was the largest in the history of the Association.

President Wallace Muir, in his annual address, advocated, and the meeting authorized, the following actions: (1) The establishment of permanent headquarters, in charge of a paid full-time Executive Secretary at the State Capital, Frankfort, Kentucky; (2) The adoption and approval of a report made by a committee of the Louisville Bar Association on the unlawful practice of the law; (3) The approval of the all inclusive Bar Organization Bill and the appointment of a Committee to urge its passage at the 1932 Session of the General Assembly.

The principal address was delivered by Honorable Henry W. Anderson, of Richmond, Virginia, a member of President Hoover's Law Enforcement Committee, on the subject: "What can we do with Prohibition from a Legal, Social and Economic Standpoint?"

Judge Charles Kerr, formerly of Kentucky, now of Washington, D. C., delivered an address on the lives of John G. Carlisle and William H. Wadsworth, the title of which was, "Some Great Lawyers of Kentucky."

The Committee on Legal Education & Admission to the Bar, through Robert T. Caldwell, Chairman, reported that at a recent meeting of the Court of Appeals, attended by himself, the president of the Association, and R. Allan Stephens, of the American Bar Association, the court had raised the requirements for admission to the Bar in Kentucky. Effective as of August 1932, the applicant for admission must have completed, successfully, two years of study at an incorporated law school. While two years of law study are now required, one of the two years may be spent in a law office.

J. VERSER CONNER
President Kentucky State Bar Association

Judge Charles I. Dawson, Judge of the United States District Court for the Western District of Kentucky, spoke on "Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy." The incoming Law Reform Committee of the Association was directed to prepare and present to the Legislature a bill designed to effect the reforms suggested by Judge Dawson.

Judge J. R. Keaton, president of the Oklahoma Bar Association, spoke on the "Workings of the Oklahoma State Bar."

Dean Evans, of the State University Law School, spoke on "The Law School of the University of Kentucky, and its Relationship to the Bar Association."

The following officers were elected for the ensuing year: J. Verser Conner, Louisville, Ky., president; Wilson W. Wyatt, Louisville, Ky., secretary; Clinton M. Harbison, Lexington, Ky., treasurer; Executive Committee: Leslie W. Morris, Frankfort; James Park, Lexington; Coleman Taylor, Russellville; John K. Todd, Shelbyville; Ben D. Smith, Somerset; Wallace Muir, Lexington.

The Vice Presidents from the seven appellate districts are: First, Malcolm P. Wallace; Second, Wilbur K. Miller; Third, W. L. Porter; Fourth, A. C. Van

Winkle; Fifth, William B. Gess; Sixth, Judge C. D. Newell; Seventh, Hugh Riddell.

WILSON W. WYATT, Secretary.

Mississippi

Mississippi State Bar Favors Legislative Integration—Special Grievance Committee Reports

The regular annual meeting of the Mississippi State Bar Association was held in Meridian on April 29-30.

The annual address was delivered by the Honorable J. W. Garner, who spoke most interestingly on the World Court. Reports were also read by Hon. Fred J. Lotterhos and Hon. Julian Alexander, of Jackson, Mississippi.

A feature of the meeting was a report of the Special Grievance Committee on its work in filing disbarment proceedings against six prominent attorneys of the state before the Supreme Court. Disbarment proceedings were also ordered to be instituted against three other attorneys. The State Bar Association showed itself determined to purify the bar of the state. The report of the Special Grievance Committee was delivered by Hon. Jeff Truly, Chairman, former Supreme Court Justice of Mississippi.

A special feature of this meeting was a report of the committee on reorganization. By an overwhelming vote the Bar Association adopted this report, and went on record as favoring reorganization of the State Bar Association along the plans adopted by such states as Alabama, California, Idaho, etc. Motion was made and carried by a large majority that the incoming president appoint a committee to draft a bill along this line and present it to the legislature of the state at its 1932 session. A motion was also carried to authorize the incoming president to appoint a steering committee of five to bring the plan before the legislature and to aid its passage.

JOHN C. COOPER, JR.
President Florida State Bar Association

The meeting was considered the most successful ever held by the State Bar Association, and was ably presided over by George Butler, the retiring president.

The following officers were elected: W. W. Venable, president; R. L. Dent, vice-president; J. J. Breland, J. T. Brown and R. W. Heidelberg, Executive Committeemen.

Members of the Executive Committee, the president, vice-president, will elect the secretary-treasurer at a meeting of the Executive Committee in the near future. This position is now occupied by Louis M. Jiggitts.

Miscellaneous

R. H. Brown, of Duncan, was elected president of the Fifteenth Judicial District (Okla.) Bar Association following the formation of a permanent organization in April. D. B. Madden, of Walters, was elected Vice-President, and Edward Henderson, of Duncan, Secretary-Treasurer.

The Stephens County (Okla.) Bar Association was recently reorganized with the following new officers: Henry Sitton, President; J. G. Clift, Vice-President and Gilbert Bond, Secretary-Treasurer.

The first annual meeting of the Fifth District (La.) Bar Association was held in the early part of April. Following are the officers of the Association: President, John R. McIntosh of Oak Grove; Vice-Presidents, E. B. Moore and Tobin R. Hodge; Secretary and Treasurer, W. Davis Cotton, of Rayville.

Officers of the Fort Smith (Ark.) Bar Association for the coming year were chosen at a meeting of the Association on the 14th of April. Roy Gean was elected President; C. R. Barry, Vice-President; Paul Lynch, Secretary-Treasurer.

John R. Hanna will head the Chelan County (Wash.) Bar Association for another year. Other officers chosen at the recent annual banquet of the Association are Sam Sumner, Vice-President and L. J. Gemmill, Secretary-Treasurer.

The following new officers were elected at the annual meeting of the El Paso (Tex.) Bar Association held March 21st: R. A. D. Morton, President; Gowan Jones, Secretary, and John Penn, Treasurer. Robert E. Cunningham and Harold Potash were named new directors.

Judge Paul B. Johnson was elected President of the Hattiesburg (Miss.) Bar Association at a recent meeting of that organization. J. K. Travis was named Secretary of the Association.

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- ☐ Frauds
- ☐ Lost Deeds
- ☐ Lost Wills
- ☐ Invalid Powers of sale
- ☑ Mistaken Identity
- ☐ Misrepresentation of fact
- ☐ Posthumous child
- ☐ Unknown encumbrance
- ☐ Dower claims
- ☐ Defective foreclosure

A Case of Mistaken Identity

A certain plot of land belonged to Mr. X, a non-resident. A local man, known to have extensive real estate holdings, also named Mr. X, died intestate leaving a widow and a grown son. These heirs employed an attorney to probate the estate of the deceased. In the schedule of assets filed with the petition for probate the attorney included the lot in question as the property of Mr. X deceased. The estate was regularly settled. In due time the widow and son as the only heirs sold this plot to Mr. Y, who had the title insured.

Six months later the real owner Mr. X appeared, discovered Mr. Y in possession of his property and brought suit in ejectment to recover his land.

Mr. Y appealed to the Title Company for protection. It took charge of the defense but lost, Mr. X successfully establishing his ownership and the mistaken identity involved. The Title Company not only paid attorney fees and costs, but reimbursed Mr. Y up to the face of the policy, which covered the full purchase price.

Title insurance guards against loss from the many hidden, unsuspected liabilities which constantly threaten property ownership.

As a lawyer you know that even the most careful title search is not proof against human error. More and more, attorneys recognize the wisdom of advising clients who are buying or lending on real estate to insist that a title policy be included in the transaction.

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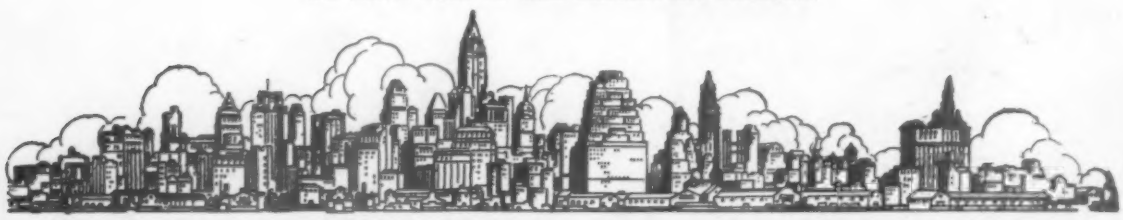

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